



United Nations Latin-American Institute for Crime Prevention and
Treatment of Offenders



Women, Justice and Gender Program

Training Module

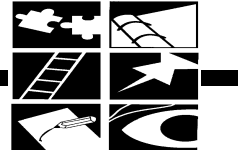
International Humanitarian Law
International Criminal Law
International Criminal Court



United Nations Development Fund for Women (UNIFEM)



Coalition for an International Criminal Court



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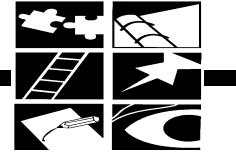
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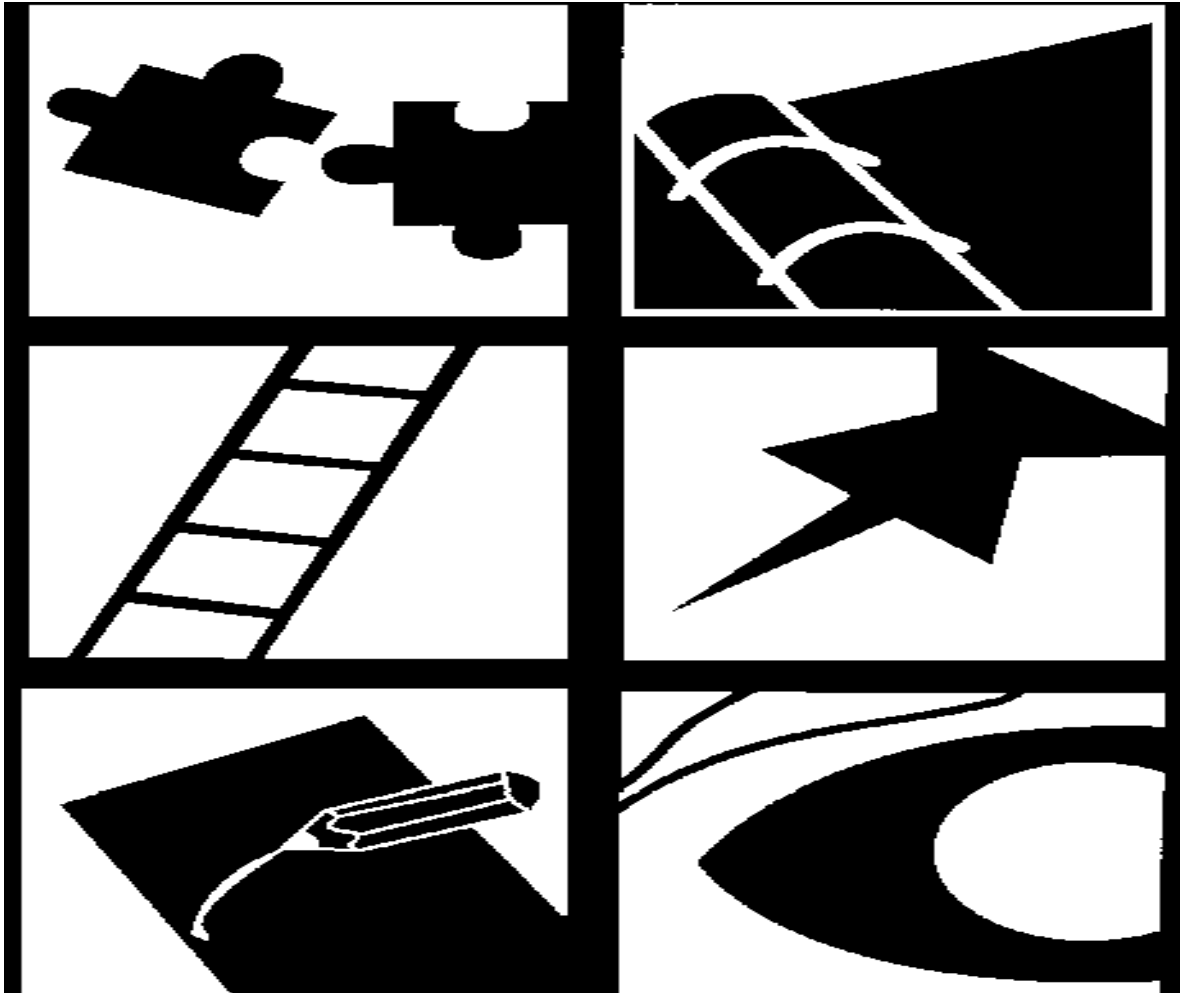
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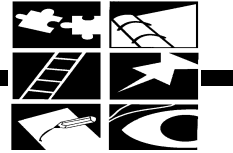
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INTRODUCTION







List of Abbreviations

CICC: Coalition for an International Criminal Court

ICC: International Criminal Court

IHRL: International Human Rights Law

IHL: International Humanitarian Law

ICL: International Criminal Law

ILANUD: United Nations Latin American Institute for Crime Prevention
and Treatment of Offenders

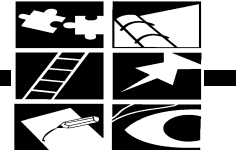
OAS: Organization of American States

NGOs: Non-Governmental Organizations

UN: United Nations

UNIFEM: United Nations Development Fund for Women





INTRODUCTION

This is a module from the *Modular Manual: Towards True Equality (Manual en Módulos: Hacia la Igualdad Real)* produced by ILANUD and UNIFEM. Like the other modules, is not directed to the public in general but rather to individuals organizing training workshops on the topics at hand. In summary, this manual is for people facilitating workshops on International Humanitarian Law, International Criminal Law and the International Criminal Court.

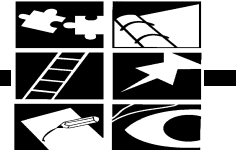
Due to the great interest today in the topics addressed in this module, it has been designed to stand alone if needed. We have included a brief explanation of the structure and background of this module for facilitators who wish to use it independently.

Background

The idea to create a modular training manual, particularly for Justice Administration staff, addressing the human rights of women from the perspective of gender arose from work underway since 1994 in UNIFEM's Andean Office and the Women, Justice and Gender Program. The first volume of the "Modular Manual: Towards True Equality" originated from this work and was published in October 1997, after each module was validated in various Andean countries, in Central America and in Chile.

Since then, the Women, Justice and Gender Program of ILANUD has continued creating modules for the manual, which have been validated in various Central American countries and will be published shortly. In the meantime, UNIFEM's Andean Office contacted the director of the Women, Justice and Gender Program to request that the Program create a module on international humanitarian law. Since the Statute of the International Criminal Court had just been approved in Rome in 1998, and since international criminal law was a new discipline with roots in international humanitarian law, it was essential to refer to the International Criminal Court in the new module. Thus originated the idea of a manual-module on "International Humanitarian Law, International Criminal Law and the International Criminal Court."

The first draft of this manual, created by ILANUD consultants Lorena Flores, Ana Lucía Herrera and Gloria Maira, under the direction of Alda Facio and using the methodology developed by the Women, Justice and Gender Program, was validated in various workshops in Colombia. Both workshops (one in Bogotá and the other in Barranda) were financed by UNIFEM's Andean Office. Workshops were also held in San Salvador and Guatemala City, financed by ILANUD. These workshops resulted in the elaboration of the second draft.



A meeting to revise the second draft was called in October 1999. Participants included Luz Marina Tamayo, a Colombian expert in IHL; Ana Elena Obando and Lorena Fries, both active in the *Caucus de Mujeres por una Justicia de Género* (Women's Caucus for Gender Justice) ; Gilma Andrade and Roxana Arroyo, additional Program consultants; Program Director Alda Facio; and Program Sub-Director Rodrigo Jiménez. A third draft, which was, translated into English, incorporated suggestions made in the meeting and Dr. Tamayo's contributions. This draft was validated in a December 1999 meeting in New York held by ILANUD and the *Caucus de Mujeres por una Justicia de Género*. *Caucus* members from various countries were present, including: Eleanor Conda from the Philippines, Alda Facio from Costa Rica, Pam Spees from the United States, Marina Meshki from Georgia, Ramini Muttettugawa from Sri Lanka, Tulika Srivastava from India, Rashida Manjoo from South Africa, Doris Mpoumou from Congo-Brassaville, Some de Epie-Eyoh from Cameroon, Gabriela Mischkowski from Germany and Ana Elena Obando from Costa Rica.

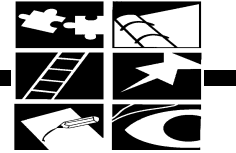
A fourth draft incorporating suggestions from the New York meeting was drawn up. This draft, revised and enlarged by Alda Facio, Rodrigo Jiménez, Eduardo González and Violeta Bermúdez, with the assistance of Cynthia Chamberlain, became the present manual.

Structure

The module is divided into an introduction, presenting background and structure; a second section containing the steps to follow in the workshop; a third section containing annexes with the information facilitators need to carry out the steps; a fourth section containing supplementary readings which should be read in their entirety by the facilitators and can be photocopied and distributed to participants; and a fifth part containing slides or information the facilitator can use on a blackboard if he or she does not have access to a slide projector.

The module contains five topic or chapters, divided into sub topics. A shadowed box at the beginning of each topic contains the thematic objective of the chapter; the material resources required to develop the topic, differentiating between those already included in the manual and those which should be obtained by the facilitators; a list of supplementary readings included in the module; a list of recommended reading not included in the module; and the estimated completion time for the topic.

In order to facilitate preparation, each section has its own numeration with its own heading and color.



Objective

The Module's objective is to bring participants into contact with the topics and enable them to defend the rights of all people, especially of women, in times of peace as well as in times of armed conflict. It is hoped that this contact will inspire participants to further deepen their knowledge of the topics and other topics not included in the workshop. Another goal is for participants to take an interest in participating in the Coalition for an International Criminal Court¹, in order to achieve the prompt establishment of a court able to judge and sanction those who commit crimes against peace and human rights when national courts cannot or will not prosecute them.

Contents

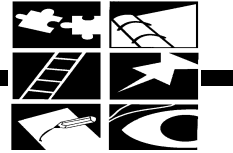
In addition to the four main topics and their respective sub topics on IHL, ICL, the ICC, and the ICC's ratification process, crime victims and the rights of internally displaced persons have also been included as topics, since they are closely tied to IHL and ICL (if and only if they do not contradict article 17 of Protocol II of the Geneva Convention.) Special emphasis is placed on the situation of women in this module, since women and children suffer the most from violations of the human rights protected by branches of the laws studied here.

The module, then, is comprised of five topics. The first centers on the notion of international humanitarian law and its closeness and distance to human rights. The second topic addresses the basic principles of international criminal law, as well as the core international crimes and their evolution, in particular in relation to gender. The third topic focuses on victims of international crimes and internal displacement. The fourth topic centers on the International Criminal Court, particularly its origins, jurisdiction and proceedings, and the fifth topic addresses the ICC ratification process, the relationship between the ICC and national legislation, and its importance in the American context.

Facilitator profile

The workshop needs at least one facilitator with legal training and knowledge of IHL. It would also be helpful for one facilitator to be familiar with the creation of the ICC and have followed its progress. At least two facilitators should be present, along with support staff for event logistics. Topic Four requires that the facilities have up-to-date information on the status of the ICC in the country

¹ The principal objects of the CICC is to advocate for the creation of an efficient, just and independent ICC. The Coalition convokes a wide network of NGOs and experts in international law, united to create strategies on legal and political matters related to the proposed Statute. One important objective is promoting the understanding and support of a wide sector of civil society organizations: human rights and peace defenders, international law scholars, procedural law scholars, humanitarian organizations, religious organizations, women's organizations, etc.



where the workshop is taking place. Workshop organizers can also refer to the CICC web page <http://www.igc.org/icc/> and the ICC web page <http://www.un.org/law/icc/> for the latest information.

Estimated time: At least two days to cover the entire module. It is also possible to cover just one or two of the topics in a shorter workshop.

Number of participants suggested: Between 20 and 25 people already been trained in gender and legal theory.



Thematic objective

To learn about the normative framework for the regulation of armed conflict and the treatment of women within those norms.

Material Resources

A. INCLUDED IN MANUAL

- Annex 1: Questions and news clippings
- Annex 2: International Humanitarian Law, background and concepts
- Annex 3: Differences between International Humanitarian Law and International Human Rights Law
- Slides 1-14

B. NOT INCLUDED IN MANUAL

- 30 7.6 x 12 cm cards
- Three copies of each of the four Geneva Conventions and their two Additional Protocols

Supplementary Readings

1. International Committee of the Red Cross. *What is Humanitarian Law*.
2. International Committee of the Red Cross. *Implementing International Humanitarian Law: from Law to Action*.
3. International Committee of the Red Cross. *Protocols Additional to the Geneva Conventions of 1949 for the Protection of War Victims*.
4. Gardam, Judith. *Gender and Non-combatant Immunity*".
5. *Women's Caucus for Gender Justice. "International Criminal Court: Ensuring Justice for Women*.

Recommended Video

"Even War Has Limits", which can be found in any Ombudsman Office (*Defensoría*) in Colombia, or go to the web page <http://www.defensoria.org.co>.

Recommended Readings

- Arias Londoño, Melba. *Human Rights of the Woman, Child and Adolescent*.
- O'Donnell, Daniel. "Tendencies in the application of international humanitarian law by United Nations human rights mechanisms.
- Freeman, Shirley and Ormiston, Helen: *War and International Humanitarian Law*.
- Viteri, Pietro. *Dictionary of International Law in Armed Conflicts*.

Estimated Time: Four hours

TOPIC ONE

International Humanitarian Law and International Human Rights Law: Two Systems for Protection





Steps to Follow

Presentation

Present workshop objective, explaining that the intent is for participants to obtain a surface knowledge of international humanitarian law and the emerging international criminal law. Participants should understand that all people have rights, even if they live in an armed conflict zone. Among these rights are that those who commit certain crimes prohibited by IHL, IHRL, and national law, should be judged and sanctioned.

- Emphasize the importance that all the inhabitants of a country, even one in a state of armed conflict, pressure their governments to comply with the international obligations assumed by the country.
- Tell them that one expected outcome of this workshop is to inspire participants to support the creation of the International Criminal Court.
- Next, explain the methodology to be used in the workshop and review the contents of the materials distributed to them.
- To end the first step, invite the participants, including facilitators, to introduce themselves and explain why they are attending the workshop.

1. Contextualizing IHL



In order to place international humanitarian law in the context of knowledge on armed conflict participants already possess, divide them into four working groups and hand out the questions and articles from Annex 1.

In plenary, gather results from the working groups, emphasizing the following points:



- That war is a crime against humanity, as established by the Charter of the United Nations and the Charter of the Organization of American States.
- The graveness of the crimes committed and how they affect peoples' rights.
- The invisibility of women in conflicts.
- The importance that these crimes can be denounced and judged.

Close the topic by explaining that the next step will introduce IHL, the body of law containing detailed norms for the protection of victims of many of the crimes just analyzed in Annex 1.

2. What is IHL?



Next, introduce the sub topic on international humanitarian law using slides 1-3 and the text from Annex 2, "International Humanitarian Law: Backgrounds and Concepts". Emphasize that IHL establishes personal responsibility for those who committed or ordered committed crimes such as those discussed in Step One. IHL demands that people responsible for such crimes be judged and punished as criminals. Avoid falling into the logic that IHL was created to humanize war.

3. Protection of the civil population in international humanitarian law



In plenary, introduce the sub topic on protection of civil population with the following two questions:

Do you think there are specific groups within the civil population that require special protection? Which ones?

Do you think women should or should not receive special protection? Why?



Then divide participants into groups of 5 and ask them to establish specific rights and prohibitions concerning civil populations in armed conflicts. Conclude this topic with slides 4 and 5.



4. Protection of women in IHL



Introduce the topic of protection of women in war with slide 6, “Protection of women in international humanitarian law”. Also use the following articles: Geneva Conventions, III, arts. 14, 16, 49, 88, 97, 108; IV, arts. 16, 17, 23, 27, 38; V, arts. 76, 85, 89, 91, 124; and Additional Protocol II, art. 5 subsection (a) and art. 6 subsection (4).

Divide participants into three work groups and give them each a copy of the Geneva Conventions and Additional Protocol II. Tell them to read the articles listed above to determine if there are norms to protect women, and if they are sufficient.

- The first group should work on the situation of women combatants;
- The second group should work on the situation of women no longer in combat because they have been captured or wounded;
- The third group should work on the situation of women in the civil population.

Once each group has presented their work, analyze the special protection provided for women in agreement with the articles mentioned, emphasizing the following ideas:

- The relation of women to war, as it differs from that of men.
- The non-existence of specific norms for the protection of women combatants.
- The relation women-mother, woman-weak that exists at the base of said protection.

5. International Humanitarian Law and Human Rights



To relate IHL and human rights and identify their differences, convergences and similarities, initiate a discussion using slides 7 and 8. The facilitator should take into account participants’ observations on the extent of these concepts and incorporate elements to enrich these ideas.



Next, divide participants into four work groups. Hand out Annex 3 and tell them to decide to which branch of law each of the characteristics listed in the Annex belong.

While the groups are working, the facilitators should copy each characteristic from Annex 3 onto cards for use in plenary.

In plenary, read the cards one by one. Have the participants decide if they belong under the column for IHL or IHRL, or in a middle column for characteristics belonging to both branches of international law.

In closing, give a brief talk using slides 9-13. Remind them that IHL and IHRL constitute two branches of law whose origins have different objectives and instruments, but that by the end of the 1960s humanitarian law and human rights slowly began to draw together. The Tehran Conference on Human Rights, where the United Nations first considered the application of human rights to armed conflicts, was a crucial moment in this process.

6. Similarities between IHL and IHRL



Leaving the three columns with the cards in view, initiate a discussion using slide 14. Point out that the differences are not totally categorical. Similarities and convergences do exist between both branches of law.

7. Close Topic One



OPTIONAL

End Topic One with the video "*Hasta la guerra tiene límite*" (Even War Has Limits) and lead a debate in plenary about the video.

Note: The video can be found in any International Red Cross office. If you opt to show the video,



total workshop time will be extended by at least 30 minutes.

Thematic Objective

To learn the basic principles of international criminal law and the crimes that make up its hard core, and how they have evolved in relation to the incorporation of a gender perspective.

Material Resources

A. INCLUDED IN MANUAL

- Slides 15-19
- Annex 4: Fundamental principles of international criminal law
- Annex 5: Background and definitions of international crimes
- Annex 6: International crimes
- Annex 7: Crimes of sexual violence or gender

B. NOT INCLUDED IN MANUAL

- Three Statutes of the ICC
- Three Penal Codes of the country where the workshop is being held

Supplementary Readings

6. Amnesty International. *Universal Jurisdiction: Fourteen Principles of Universal Jurisdiction*
7. Kosimik, René. *The 1977 Protocols: a Landmark in the development of international humanitarian law.*
8. International Red Cross. *Criminal Repression: Punishment of War Crimes*
9. United Nations. *Sexual Violence and Armed Conflict.*
10. Dorsen, N. and Fowler J. *The International Criminal Court: An Important Step Toward Effective International Justice.*

Recommended Readings

- Copelon, Rhonda. "Engraving crimes against women in Humanitarian Law." *Hastings Women's Law Journal*, 1994.
- King, Faiza. "Jurisprudence of the Yugoslavia Tribunal." *European Journal of International Law*, 1997.
- To review cases, sentences and other documents of the ad-hoc Tribunals, see:
<http://www.un.org/icty>
<http://www.icttr.org/>

Estimated time: Two hours

TOPIC TWO

International Criminal Law and International Crimes





STEPS TO FOLLOW

1. International Criminal Law



In plenary, introduce the topic of international criminal law using slide 15. Give a brief talk based on the main ideas of Annexes 4 and 5, or invite an expert on international criminal law to speak.

2. International Crimes



In plenary, introduce the topic of international crimes using slides 16 and 17. Emphasize the fact that States have an obligation to search for and punish all people who have committed these crimes, regardless of the criminal's nationality or the location the crime took place. To do this, States are obligated to take legislative measures classifying these crimes in their respective penal codes.

Divide participants into three work groups and give each a copy of the penal code of the country where the workshop is being held. Ask them to look for the international crimes included in the Codes. Briefly discuss results in plenary.



Divide participants in groups and ask them to create a list of conducts they think should be included in what are called international crimes today. Once the groups have finished, present results in plenary and initiate a debate on the most controversial crimes.



Close the topic of international crimes in general with slides 18-19 and Annex 6. Analyze the correspondence between what the groups suggested as international crimes and what actually exists on the international level (actual definitions, the ICC statute).

3. Crimes of sexual violence



Divide participants into three groups and hand out a copy of Annex 7 and the penal code for the country where the workshop is taking place to each group. Ask them to analyze the development of these crimes or the lack thereof, according to the following points:

- The importance of jurisprudence to legislative transformation.
- The relation between international and national legislation
- The holes in national legislation in respect to the jurisprudence of the ad-hoc Tribunals and the Statue of the ICC—for example, in cases of rape, other kinds of sexual violence, sexual slavery, etc.

In plenary, gather and comment on the groups' results.



Thematic Objective

To know the specific rights of victims of international crimes and of internal displacement.

Material Resources

A. INCLUDED IN MANUAL

- Slide 20
- Annex 8: Questions for exercise on victims
- Annex 9: Amnesty International, "Guaranteeing Justice for Victims."
- Annex 10: Declaration of basic principles of justice for victims of crimes and abuse.
- Annex 11: Codification of international norms regarding persons internally displaced inside a country.
- Annex 12 and 13: Work guides
- Annex 14: Guiding Principles on Internal Displacement

B. NOT INCLUDED IN MANUAL

- Three Criminal Procedure Codes or similar legislation

Supplementary Readings

11. Hadden, T. and Colin, H. *The Law of Internal Crisis and Conflict*.
12. Lavoyer, Jean-Phillipe. *Guiding Principles relating to the displacement of people within their own country*.

Estimated time: Three hours

TOPIC THREE

Victims of International Crimes and Internal Displacement





STEPS TO FOLLOW

1. The law for crime victims



Form three work groups.

The first should work on the topic of victim participation in the trial.

The second should work on the topic of witness and victim protection during trial.

The third should work on the topic of victim reparations.

Hand out the questions from Annex 8 to each group, along with a Criminal Procedural Code. Have them discuss and respond to the questions.

When groups have finished answering questions, hand them Annexes 9 and 10 and compare the answers given in these documents.

In plenary, each group should present their results.

2. The law for internally displaced persons (IDPs)



Using slide 20, Annex 11, and supplementary readings 10 and 11, give a short talk on the rights of IDPs.



Form two work groups.

The first should use the work guide and readings from Annexes 11 and 12.

The second should use the work guide and readings from Annexes 13 and 14.

Ask the participants to join together again in plenary and present their results. Initiate a discussion and debate on the rights IDPs *do* have and the rights they *should* have.



Thematic Objective

To learn about the process creating the International Criminal Court and the importance that organized civil society participate it's creation.

Material Resources

A. INCLUDED IN MANUAL

- Slides 21-27
- Annex 15: Background on universal jurisdiction and the International Criminal Court.
- Annex 16: "Debated aspects in the creation of the International Criminal Court."
- Annex 17: Fourteen Principles for a Just, Impartial and Efficient International Criminal Court.

B. NOT INCLUDED IN MANUAL

- Four copies of the Statute of the International Criminal Court.

Supplementary Readins

13. International Red Cross. *Punishing war crimes: International criminal tribunals.*

14. Burger, James. *International Humanitarian Law and the Kosovo Crisis: Lessons learned or to be learned.*

15. Human Rights Watch. *The ICC Jurisdictional Regime.*

16. Garraway, Charles. *Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied.*

Recommended Readings

- Women's Caucus for Gender Justice. "Basic principles for the establishment of an International Criminal Court."
- International Center for Human Rights and Democratic Development. Occasional paper. "The Rome statute for an International Criminal Court: The beginning of the end of impunity." January 1999, Canada.

Also Recommended: Visit CICC's website for very valuable information on everything related to the ICC: <http://www.igc.org/icc/html/coalition.htm>

Estimated Time: Two hours

TOPIC FOUR

The International Criminal Court





STEPS TO FOLLOW

1. The International Criminal Court



Familiarize participants with the ICC by identifying the main debates surrounding its creation and the crimes it should address. Introduce topic using the reference text from Annex 15 “Background on universal jurisdiction and the International Criminal Court,” and slide 21.

Ideally, someone with ties to the Coalition for an International Criminal Court should be invited to speak, discussing their experience with the creation of the ICC and emphasizing the importance of organized civil society’s participation in the process.

Once the facilitator has outlined the topic and/or the invited speaker has finished, open up the session for questions and consultations.



Form four groups and hand each one a copy of the Statute of the ICC.

The first group should study the articles related to the structure and composition of the Court.

The second group should study the articles on investigation and bringing to trial.

The third group should study the articles on trials.

The fourth should study the articles on competence, admissibility and applicable law.

Each group should prepare a presentation for the plenary on the most important aspects of the articles they studied.



Concentrate on those aspects most debated during the drafting of the Statute, using the reference text in Annex 16.



Using Annex 17, identify as a group the principles with which NGOs (Human Rights Watch, Amnesty International, the Women's Caucus for Gender Justice) guided the creation of the ICC. Comment on these principles in light of what eventually entered into the Statute.



Using slides 22-27, explain the procedural path for all actions brought before the International Criminal Court. Once this has been completed, close the topic by taking time to answer participants' questions and doubts on the subject.



Thematic Objective

Promote the ratification of the ICC and an understanding about the ratification process works and the relevance of ratification for citizens. This will address the topic of ICC ratification from the perspective of internal approval procedures for each country as well as internal legislative repercussions.

Material Objective

A. INCLUDED IN MANUAL

- Slide 28
- Annex 18: News clippings on the ICC

B. NOT INCLUDED IN MANUAL

- Constitution of country where workshop is being held.

Supplementary Readings

17. Human Rights Watch. *The compatibility of the Rome Statute with certain worldwide constitutional provisions.*

18. Aguirresabal, Irune. *The importance of incorporating internal legislation relative to the International Criminal Court.*

19. Amnesty International. *The International Criminal Court: Summary list for effective application.*

20. Facio, Alda. *The role and agenda of organized civil society.*

21. Venice Commission. *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court.*

Suggested Readings

- CICC's information on States that have ratified the ICC. See their web page, <http://www.igc.org/icc/html/coalition.htm>

Estimated Time: Two hours

TOPIC FIVE

Ratification Process of the International Criminal Court





STEPS TO FOLLOW



For this step, facilitators should familiarize themselves with the status of the ICC (signing, ratification, automatic validity or special requirements) in the country where the workshop is being held. They should also know about the tendencies in favor of or against the incorporation of the ICC into national legislation.

In plenary, explain the process of incorporating international treaties into national legislation. Use slide 28, taking into account the variations that can exist from State to State.



The goal here is to better understand the international debate surrounding signing and ratifying the Statute. Divide participants into work groups. Hand out two or three of the articles from Annex 18 to each group as reference texts. Facilitators can add their own knowledge.

Each group should read the material handed out and summarize the positions expressed in the articles for the group as a whole.

Make a general outline summarizing the positions presented by the groups. Initiate a debate in which participants explain the underlying rationales (ideological, philosophical, political, human rights, etc) of each position presented.



Have participants divide into two groups. One group will defend the position that the Statute should be ratified in their country. The other group will counter with arguments against ratification. Ask both sides to take into account the following:



- What they have learned in the previous Topics.
- The human rights situation in the country.
- The existence or absence of armed conflicts in the country.
- What they have seen, heard or read in the media about the ICC.

Once the exercise is over, guide a discussion emphasizing the need for ICC ratification, using the supplementary readings. Give examples to demonstrate the need for ratification (Pinochet, Kosovo, North American invasions, internal armed conflicts such as in Colombia). Participants should see how the lack of recourse to something like the ICC results in suffering of civilians—principally women, the elderly, and children.



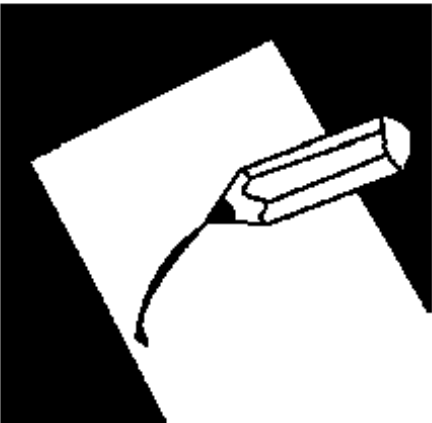
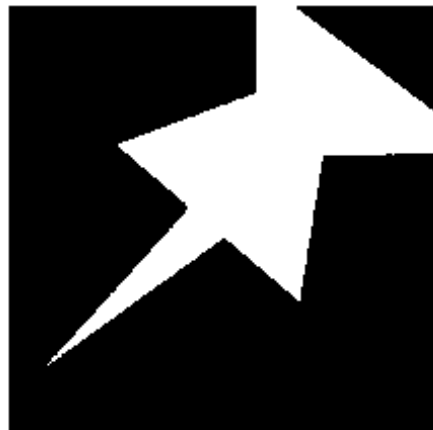
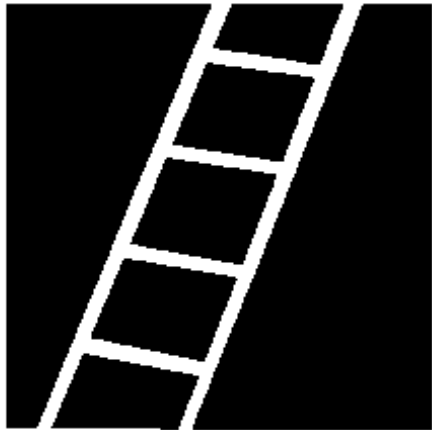
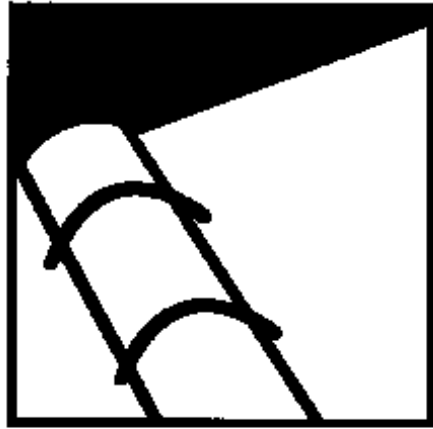
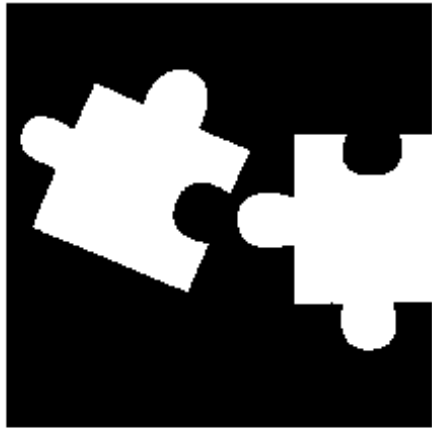
Once the discussion is over and the need to incorporate the Statute into national legislation has been reaffirmed, ask participants their respective governments can be urged to adopt the Statute.

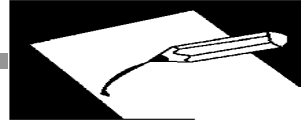
As a model, facilitators can present the following points:

- Citizen-State relationship. The authorities should respect citizens' interests; therefore it is legitimate to pressure the State to ratify the ICC since it represents our interests.
- Relationship between citizens. Citizens can seek to form alliances to put pressure on authorities.
- Mechanisms available to civil society: Campaigns, public events such as marches, opinion pieces in the media, letters, etc. Annex 18 can also be used for suggestions.

Finally, gather the results of the discussion, suggestions and agreements.

ANNEX







ANNEX 1

KOSOVO

(<http://www.cnn.com>)

MASS EXODUS

Forced from their homes by Serbian troops and paramilitary police, thousands of ethnic Albanian refugees fled across the border into neighboring Macedonia and Albania. Many walked or traveled by tractor, while the weak and elderly were transported in wheelbarrows or on the backs and shoulders of others.

RESETTLEMENT OF REFUGEES

Overcrowding in refugee camps around Kukes, Albania, forces ethnic Albanians to relocate to camps south of Tirana, Albania. Making the 24-hour journey by trains and military trucks, they were allowed to take only what they could carry.

KOSOVARS KILLED

On April 14, 85 people were killed when bombs struck two convoys of refugees in southwestern Kosovo. NATO officials accepted responsibility for the accident and apologized. Inset: a grieving survivor.

SERB CIVILIANS KILLED

On May 1, a missile fired by a NATO warplane struck a passenger bus crossing a bridge north of Pristina, Kosovo, killing at least 34 people. Yugoslav TV and witnesses reported that a NATO missile struck a civilian bus on a bridge north of Pristina, Yugoslavia. NATO officials admitted hitting the bus accidentally and apologized for the civilian casualties.

ETHNIC ALBANIANS KILLED IN KOSOVO

On May 13, NATO aircraft attacking what they believed was a military camp killed 87 ethnic Albanians in Korisa, a town in southern Kosovo. Witnesses said 512 ethnic Albanians had been herded by Serb guards into the courtyard of a brick factory the night before the bombing and were locked in.

Indonesia drags its feet on East Timor Tribunal

May 18, 2001

By Atika Shubert

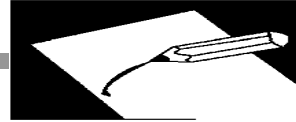
CNN Correspondent in Jakarta

Anyone seeking justice for Indonesian atrocities in East Timor shouldn't look in the courtrooms. Not one case has been tried.

Instead, take a peek in music stores and buy "For you, My Indonesia" a collection of sentimental songs crooned by retired Armed Forces commander, General Wiranto. The same General Wiranto who presided over the bloody aftermath of East Timor's vote for independence in 1999. A portion of the album's profits go to refugees in West Timor, forced there by Indonesian military-backed militias. Justice isn't prosecutions or trials, only a percentage of General Wiranto's profits.

Demands for justice

Pressure is mounting on Indonesia to bring the East Timor atrocities to trial or face an international war crimes tribunal. Only 12 cases are set to be tried in an Indonesian ad-hoc tribunal that has yet to be formed.



These cases are limited, however, to events occurring after the 1999 referendum, not for any crimes committed before the vote. That means incidents like the Liquica massacre -- where witnesses say more than 25 people were hacked to death in a church by Indonesian military-backed militias -- will go uninvestigated.

UN officials say that Indonesia is also blocking cases in East Timor by refusing to hand over crucial evidence and witnesses, in violation of a memorandum of understanding between Indonesia and the UN.

The highest-ranking military officers, such as General Wiranto, have been dropped from Indonesia's list of suspects despite a recommendation by Indonesia's Human Rights Commission to try top commanders for failing to control troops.

Well-known militia leaders like Eurico Guterres are also off the hook despite a video taped speech by Guterres directing his followers to murder pro-independence leaders.

"It is extremely disappointing that the attorney general is ignoring all the evidence," says Asmara Nababan, one of the lead investigators of the Indonesian Human Rights Commission. "It shows the Indonesian judiciary system is still rotten to the core."

Reluctance to try militias

Yet nothing speaks louder of Indonesia's reluctance to try the militias and their military backers than the conditions in West Timor's refugee camps.

Militias, backed by elements of the Indonesian military, drove more than 250,000 people over the border into West Timor after the vote. With the help of UNHCR and other aid groups, more than 170,000 have opted to return to East Timor. But more than 80,000 remain stranded in squalid camps under the threat of the militias that live among them.

In September 2000, 3 UNHCR workers helping refugees were murdered, mutilated and their bodies set on fire by a mob of rampaging militia, driving away all international aid from West Timor. Three militiamen admitted to participating in the killings but the Indonesian court handed down a jail sentence of only 16 - 20 months.

"The three UNHCR international staff members were brutally killed. Twenty months in jail certainly does not reflect the nature of the crime," UN Transitional Administrator in East Timor Sergio De Mello said.

Kidnapped: pinned by the sword and the wall

For the families and friends of Colombia's kidnapping victims, hope tempers the horror and the anger

By Steve Nettleton

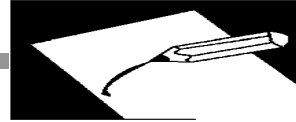
CNN.com Correspondent

BOGOTA, Colombia (CNN) -- She does not know if her husband is listening, but Claudia Ponto is determined to share the good news.

"You are the proud grandfather of eight beautiful puppies," she says into a microphone. "The dog decided to give birth at four in the morning in Carlos Andres's bed."

The studio of Radio Nacional is the only place Ponto can talk to her husband, who is one of hundreds of kidnapped Colombians held captive by groups of guerrillas, paramilitaries or criminals. In the hope her husband is allowed to tune in, Ponto tries to keep him up to date on what is happening back home.

"Love, when you hear this message it will be the day before our son's birthday," she continues. "I want you to know that I bought him a present in both of our names just like we used to. We will cut the cake and spend time with him. Love, even though you are not here physically, I know you will be here in spirit."



Outside the studio, Angela Mendez reads over her own message. She sits squeezed among other wives, mothers, brothers and children of kidnap victims also waiting to address the microphone. Mendez's husband disappeared 18 months ago as he drove his car on a busy Bogota street. She has heard nothing from him since.

Her friends have told her not to have hope, she said. They suspect her husband was seized by guerrillas and has been recruited into their ranks. Mendez refuses to believe them. She thinks her husband is a prisoner and that he draws strength from hearing her voice on the radio.

"At the beginning, it was difficult. I couldn't even read [my words]. It was something very terrible," she said. "But now I send the messages with faith he will get them."

"[The families] say that for them, this is their daily nourishment, their daily spiritual nourishment," said Viviana Esguerra of the private anti-kidnapping organization, Pais Libre, which sponsors the radio program.

They try to sound upbeat, to encourage their loved ones that they will soon be free. Many break down in mid-sentence, their voices cracking under the weight of the pain of separation.

"Silvio, we pray to God that you will be released," one woman struggles to say between sobs. She stops and covers her face with her palm, receiving a hand of comfort from the radio host. She will get another chance to record her greeting. In the meantime, a young girl takes her turn.

"Hi there, this is Pupi talking. Mommy couldn't come because she had to do other things, but I am here to support you and give you strength. We love you very much. Bye."

Twice a week, families of the kidnapped repeat this somber ritual at Radio Nacional. The growing crowds of people who line the corridors rehearsing their comments are a testament to how in Colombia kidnapping has become an institution.

Children are becoming targets

Every three hours someone is kidnapped somewhere in Colombia, according to Pais Libre. More than half the world's kidnappings take place in Colombia, according to the British Medical Journal, and the country is on pace to set a new record this year.

Colombia is projected to see more than 3,000 cases by December, nearly double the number of people kidnapped in 1991, one of the worst years of drug-related violence led by the notorious Cali and Medellin drug cartels.

Pais Libre believes that figure is grossly underestimated. Many families do not report kidnappings because they fear that involving the police could endanger their relatives.

The majority of the victims -- more than 55 percent -- are seized by leftist guerrilla groups that use the ransoms to fund their insurgencies. Many victims are grabbed at sporadic rebel checkpoints on rural highways. Some are taken prisoner by criminal gangs in the cities and later sold for a "finder's fee" to guerrilla forces.

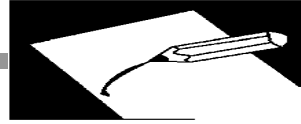
The largest rebel army, the Revolutionary Armed Forces of Colombia (FARC), refuses to call the practice "kidnapping." The FARC said it "retains" the rich and charges them a "tax."

"When a person takes away something from another for a lucrative personal interest, that is kidnapping," said Raul Reyes, the FARC's chief spokesman. "But when taxes are applied for a political or a social goal or for the transformation of a society, that is taxing. Those are simply taxes."

Earlier this year the FARC announced "Law 002," a decree ordering all Colombians who earn more than \$1 million a year to pay a percentage to the rebels or risk being taken captive.

"It is against our principles to use force to get them to pay taxes, but unfortunately when they don't pay voluntarily, we have to take measures that we don't like, measures that go against our revolutionary principles," said Reyes.

Not only the wealthy are victims of kidnapping, though More and more of the victims come from the middle class, and more and more of them are children.



\$4 million for a 3-year-old.



Rwanda Says All Western Countries Knew of Genocide

By Jean Baptiste Kayigamba (Reuters)

KIGALI, Rwanda (Reuters) - Rwanda said Thursday that all Western powers, not just the United States, that turned a blind eye to genocide there after newly declassified documents showed U.S. officials were aware of the killing at an early stage.

Hundreds of pages of U.S. archive material released this week showed officials avoided using the word "genocide" because it could have obliged them to intervene, while high-level officials made scant effort to stop the slaughter in 1994.

"It was not only the U.S. government but most importantly all Western countries which had embassies in Rwanda were fully aware of the preparations of the genocide," Charles Muligande, secretary general of the ruling Rwandan Patriotic Front, said.

"I think the minimum they should do is to acknowledge that they betrayed the Rwandese people, and following this betrayal they should undertake concrete measures to help us heal the past," he told Reuters.

The United Nations, the United States, Belgium as the former colonial ruler of Rwanda, France, the Catholic Church and many others have come under fire for not preventing the slaughter, in which 800,000 people were shot and hacked to death.

Extremists from the ethnic Hutu majority slaughtered minority Tutsis and Hutu moderates in 100 days of murder, following the death of Rwandan President Juvenal Habyarimana. He was killed when his plane was shot down on April 6, 1994.

The U.S. documents were released this week by a research group at George Washington University called the National Security Archive, which spent years following the paper trail.

Former President Clinton, in a visit to Rwanda in 1998, came close to an apology when he acknowledged the world community "did not do as much as we could and should have done to try to limit what occurred."

U.N. Secretary-General Kofi Annan commissioned a report, published in December 1999, on the events leading to the genocide. Its findings accused the United Nations of being timid and disorganized and having failed to intervene.

Several countries were cited for not reacting to reports on the genocide and the United States had delayed a small U.N. peacekeeping force because of its debacle in Somalia in 1993.

QUESTIONS

- Which crimes do you recognize and on what do they consist?
- Which common characteristics do these crimes have?
- Why are these serious crimes of international concern?
- How do you think these crimes affect the women in the conflict regions?
- Do you know any international tribunal? Which? What do you know about it?



ANNEX 2

International Humanitarian Law: Background and Concepts

War has been regulated in all cultures, and all cultures have sought a certain equilibrium between the use of force for military purposes, and the consideration of humanitarian factors. These humanitarian considerations can be attributed to the human understanding that total war can only lead to death for the parties and societies involved; participants in a conflict, although they are committed to dying for a cause, want to win and survive.² The humanitarian regulations of war that result from this understanding have varied over time and place.

The following examples may be used at the facilitators' discretion:

- The humanitarian regulations of the medieval Crusades applied only to knights and crusaders. In contrast, 18th and 19th century regulations extended to all combatants and civilian populations.
- In ancient China, Sun Tzu (5th century AD), author of *The Art of War*, prohibited killing an unarmed enemy and obligated medical care and passage home for the wounded. He also established that not all forms of combat are lawful, and he prohibited war without quarter.
- Simon Bolivar signed a convention with Pablo Murillo, which never actually came into force, during the South American campaigns of liberation from the Spanish. The November 20, 1820 document established the regulation of war “in accordance with the Rights of the Peoples, and the practices most liberal, wise and humane of the civilized nations.”³
- Andrés Bello, the Chilean poet and scholar regarded as the intellectual father of South America, published *Principles of the Law of the Peoples* in 1832. The volume dealt with international law in times of war and peace and held that during hostilities, the ill treatment of women, children, the elderly, the wounded and the sick was not lawful.⁴

Until the middle of the 19th century, the regulation of hostilities and the protection of civilian populations and victims were sporadic and unsystematic. Regulation was based on unilateral decisions made by nations or the parties in conflict. From 1850 on, the movement to regulate and humanize armed conflict grew among an increasing number of nations.

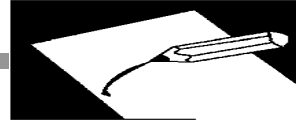
Examples:

- In 1863 in the United States, Abraham Lincoln signed General Order 100, adopting the Lieber Code—the first normative effort to regulate and humanize civil war and internal conflict. The Order was later adopted as international law at the 1907 International

² Freeman, Shirley, and Ormiston, Helen. “War and International Humanitarian Law”, *Medicine, Conflict and Survival*, Vol. 13, p. 166. London, 1997.

³ Art. 14 of the Convention, quoted by Indalecio Lievano in *Bolivar*, cited by Valencia Villa, op. cit. p. 27.

⁴ *Ibid*, pp. 20-33.



Peace Conference in Copenhagen and became the basis for Hague Convention IV respecting the laws and customs of war on land.

- The Battle of Solferino in 1859 left around 70,000 dead and 30,000 wounded. A Swiss businessman, Henry Dunant, tended the wounded with the help of the local civilians and the labor of local women. He related his experience in *A Memory of Solferino*. Horrified, the Swiss government convoked the International Conference in Geneva in 1863. The International Conference recommended the foundation of national relief societies with governmental support, the neutrality of hospitals and leper colonies, the protection of military health care workers, and the adoption of a distinctive symbol to identify protected people and property. The First Geneva Convention on the care of the wounded and sick dates from 1864 and by 1867 had been ratified by 12 nations.
- The Declaration of St. Petersburg of 1868, drafted under the reign of Czar Nicholas II, established that the object of warfare--to debilitate enemy military forces--was exceeded by the use of weapons that caused unnecessary suffering and the death of unarmed people. The Declaration placed two limits on hostilities: the prohibition of aggression towards civilians not involved in the conflict; and the prohibition of certain types of weapons and ammunition that cause unnecessary damage and suffering. The Hague Conventions of 1899 and 1907 recall the Declaration of St. Petersburg and prohibit the use of certain types of weapons, in particular of suffocating poison gas projectiles.

In 1907, the modern law on armed conflicts began to develop around two intimately related traditions: The Hague Regulations, which regulate the use of force and hostilities; and the Geneva Regulations, which seek to alleviate combatants' suffering and to protect civil populations affected by conflict.

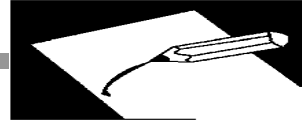
John Dugan offers this simple clarification of the differences between the Hague and Geneva Regulations. The object of the Geneva Regulations is to protect people, guaranteeing that those who no longer participate or have never participated in hostilities be treated with humanity. The object of the Hague Regulations, on the other hand, is to restrict the freedom of belligerents, prohibiting methods of war that cause unnecessary suffering.⁵

The Hague Regulations

The Hague Regulations are based on the principle of assuring the loyalty of combatants by regulating hostilities and limiting forms of combat. Some of their more important instruments are: the 1899 and 1907 Hague Conventions establishing the prohibition of certain types of armaments, especially suffocating chemical gas projectiles and biological weapons; the 1954 Hague regulations protecting cultural patrimony; the 1980 United Nations Conference prohibiting the use of excessively harmful conventional arms such as mines and booby-traps; and the Chemical Weapons Convention adopted in Geneva in 1993.

A principal difficulty in the application of the Hague Regulations is that they recognize the legitimacy of the use of force by insurgent groups. That is to say, a criminal insurrection is converted into a civil war, and the rebels thus benefit from the laws of war. The force of domestic law is then suspended, giving the war the status of an international conflict.

⁵ Dugard, John. "Bridging the gap between human rights and humanitarian law: The punishment of offenders." International Review of the Red Cross no 324, p.445-453, September 1, 1998. Online at: http://www.redcross.org.au/ihl/articles/john_dugard_bridging_the_gap_bet.htm





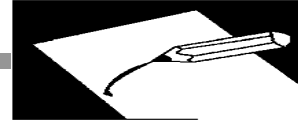
The Geneva Regulations

These regulations represent humanitarian law properly speaking. Their object is to protect non-combatant civilian populations and the victims of international and internal armed conflict. They were elaborated after World War II upon the recognition of the atrocities of that war, and the insufficiency of existing instruments to control those atrocities. In particular, the international community saw the need to create specific instruments for the protection of civilian populations.

In August 1949, representatives of 102 states signed the four Geneva Conventions: the first, the Amelioration of the Condition of Wounded and Sick Members of the Armed Forces in the Field; the second, the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the third, Relative to the Treatment of Prisoners of War; and the fourth, Relative to the Protection of Civilian Persons in Time of War.

The development of warfare technologies and the course conflicts have taken in the decades since the Second World War have determined the development of humanitarian law, culminating at the end of the 20th century with the International Criminal Court. In effect, the character of war went from international to domestic. Domestic wars are not covered by the Hague Conventions, which are only applicable to international wars. In response to this, another International Conference was held in Geneva in 1977. 177 states attended and passed two Additional Protocols: Protocol I, Relating to the Protection of Victims of International Armed Conflicts; and Protocol II, Relating to the Protection of Victims of Non-International Armed Conflicts.⁶

⁶ Shirley and Ormiston, *op. cit.*

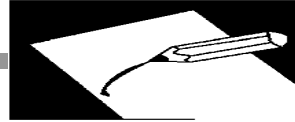


ANNEX 3

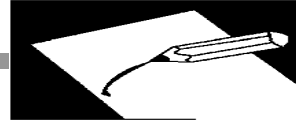
Listed below are characteristics belonging to international humanitarian law, to human rights law, or to both.

Each work group should decide to which branch of law each characteristic belongs.

- Protects all human beings equally, although legal statutes are being developed to incorporate the differences between people.
- Has its foundations in antiquity and was consolidated little by little in the Middle Ages. First developed when use force was not an illegal instrument in international politics.
- Only applies to armed conflicts.
- Though a product of domestic law, it has tended progressively towards internationalization.
- Fruit of Enlightenment era theories (17th-18th centuries), with origins in domestic law. Became important in public international law only as a reaction to the abuses of the Second World War.
- Its principle instruments are the Geneva Conventional and the two Additional Protocols.
- It is one of the oldest subjects of public international law.
- The Universal Declaration of Human Rights is the main legal instrument from which it has developed.
- It is mainly the responsibility of States, through action or omission, to guarantee and respect this law.
- Protects combatants, combatants not in combat, and the civilian population.
- This law has progressively penetrated States, to the point where it now regulates domestic conflicts.
- Responsibility for its application rests not only with States but also with the parties in conflict.
- Permits the suspension of some human rights in times of war or other emergencies that threaten national security. This excludes the “hard core” (non-derogable) rights: the right to life, the prohibition of torture and other inhumane treatment, and the prohibition of slavery.



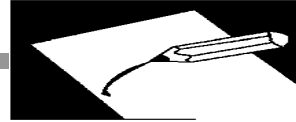
- Principally shaped by the Hague and Geneva Conventions, as well as the Convention Protocols and the Statute of the International Criminal Court.
- Concerns the organization of state power as opposed to the individual. Mainly pertains to times of peace, but also applies times of war since it deals with rights enjoyed just by the fact of being human.
- Cannot be suspended; remains in force as long as the conflict continues and afterwards, without exception.
- At the national level during times of war, military courts play an important role.
- At the national level, the ordinary courts are the proper forums to resolve violations of this law.
- Primarily formulated as the obligations of combatants, although it also defines the rights of combatants, of combatants no longer in combat, and of civilian populations.
- The language of this law, as it exists in treaties, tends to be based on the definition of rights and their compensation by State obligations.
- Its treaties are universal without regional differentiation, although parties to a conflict can make humanitarian agreements.
- This law concerns responsibility for the so-called grave violations of the laws and customs of armed conflict or war crimes.
- It was originally symbolic in nature, but a series of conventions have been established making its provisions legally prosecutable.



ANNEX 4

Basic Principles of International Criminal Law

- International Criminal Law is a relatively new legal discipline composed of legal regulations that derive from international law and domestic criminal law.
- The complementarity between international and domestic criminal systems makes international criminal law a complex legal discipline in its character, sources, methods, themes and content.
- International criminal law seeks a balance between national sovereignty and the need to regulate the multifaceted relations and interests among States, as well as the interests of the international community.
- It is the branch of law that gives force to the prosecution of violations of international law, of human rights, and of international humanitarian law. These three branches of law are interconnected and mutually reinforce each other.
- International criminal law draws its force from the following sources: international conventions, customary law, general principles, the jurisprudence of international tribunals, and documents classifying crimes and delineating the elements of crime and the means of enforcement.
- Its application will depend on: a) *ratione personae*, as established by international norms; b) *ratione materiae*, as established by international law, although some elements of crime are not clearly established by the principle of legality but are recognized by the most important judicial systems of the world; c) the responsibility arising from the criminal act established by international and customary law, in cooperation with the enforcement mechanisms of domestic systems; d) the rules of procedure of international law and domestic law that incorporate a minimum of rights of the accused; e) the application of punishments involving both international and domestic mechanisms for effectiveness; f) the completion of punishment corresponds to national legal systems even if the punishment is imposed by an international tribunal; g) the types of cooperation are the same as those used for international or national crimes (including legal assistance and cooperation, transferal of criminal procedures, transferal of sentenced criminals, recognition of foreign sentences, etc.)
- Subsidiary sources of international criminal law include international human rights law, international humanitarian law, international conventions on cooperation in criminal matters, and general legal principles recognized by the principle criminal systems.
- Private individuals, legal entities, States, and other entities are responsible before international criminal law.
- The principles of *nullum crimen sine lege* and *nulla poena sine lege* are not as specific in international criminal law as they are in some domestically legislated codes. The



- principle of legality in international criminal law can draw on customary law. Customary law draws on a dynamic process of *opinio juris* practice and international legal expectations.
- More than 270 international treaties regulate international criminal law. The following in particular should be highlighted: the Rome Statute of 1998; the statutes of the ad-hoc tribunals for Yugoslavia (1993) and Rwanda (1994); the 1948 Genocide Convention; the Convention against Torture; the 1946 Tokyo Proclamation for the establishment of military tribunals in the far east; and the 1946 UN General Assembly Resolution 95(I) Doc. A/64/ADD.1 on the Nuremberg tribunals.
 - Experts have defined 25 categories of international crimes: aggression, genocide, crimes against humanity, war crimes, crimes against UN personnel; mercenaries, torture, apartheid, slavery, pirating, airplane hijacking, illegal acts against the environment, illegal drug trafficking, illegal pornography trafficking, theft of radioactive material, possession and use of illegal arms, illegal human experimentation, illegal acts against maritime navigation, the destruction and theft of national treasures, illegal acts against internationally protected people, mail fraud, the taking of civilian hostages, illegal acts interfering with submarine cables, bribing public officials, forgery...
 - The “core crimes” of international criminal law are crimes that affect or have the potential to affect the peace and security of humanity. These are considered *jus cogens* violations. Prosecuting these crimes is the responsibility of States as well as the international community.
 - The core crimes are: crimes against humanity, war crimes, genocide and aggression.
 - The Rome Statute of the International Criminal Court includes the first three core crimes. It will not exercise jurisdiction over the fourth, aggression, until it has been defined and jurisdictional prerequisites consistent with the Charter of the United Nations have been established.



ANNEX 5

Background and definitions of international crimes

Historically, crimes have been the problem or responsibility of States, since States have the duty to try the accused in criminal courts for acts punishable under national law (the principle of *nulla crimen sine lege*.) However, there is a group of crimes whose seriousness and impact have generated such concern in the international community that any court in any State has been given competence to try those accused of such crimes.

This implies an exception of the principles of territoriality and nationality which normally guide national criminal jurisdictions, in that the former gives jurisdiction for crimes committed in the national territory to the national courts, and the latter permits nationals who commit crimes to be judged by the courts in the State of their nationality.

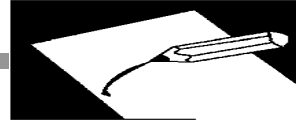
The definition of an international crimes, therefore, pertains to conduct so serious that it should not be addressed at the national level and thus falls under the principle of universal jurisdiction. The majority of international crimes are the product of conflicts humanity has lived through, and today form part of international humanitarian law and human rights.

There are no clear definitions of international crimes, nor is there a legal body that groups them together as such. In effect, defining these crimes is a process of diversified codification by various treaties or by international custom. The International Criminal Court in this sense contributes to international humanitarian law and international human rights law as it gathers together advances in codification and international custom, systematizes them and defines them in a single document: the Statute of the Court.

The legal bases of international crimes can be found in:

- International conventions that consider the conduct as criminal
- International custom that considers the conduct as criminal
- The recognition under the general principles of international law that the conduct in question is an attack against international law or a Convention.
- International conventions that prohibit the conduct although they do not call it a crime.

The importance of classifying a crime as international is that any State party to a Convention and, in the case of international custom, all States, are obligated to prosecute or extradite those accused of an international crime.



ANNEX 6

INTERNATIONAL CRIMES

Even after codifying crimes of genocide, certain difficulties in their determination remain. Crimes of genocide involve three fundamental elements: the identification of a group; the intention to partially or totally destroy the group (*mens rea*); and the commission of any of the acts mentioned in the definition (*actus rea*). The definition of “group” does not include political or cultural groups—these categories were suppressed in the original version of the Statute of Rome due to strong opposition from certain sectors. In respect to *mens rea* and *actus rea*, the prosecutor must establish the criminal intent of the accused; the ICTR and the ICTY have made important contributions to this concept.

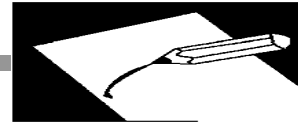
In particular, in *Karadzic and Mladic* the ICTY resolved that "The degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred. That one of the acts enumerated in the definition was perpetrated with a specific intent suffices. (...) The intent which is peculiar to the crime of genocide need not be clearly expressed. (...) The intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4 [of the Statute], or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group - acts which are not in themselves covered in the list in Article 4(2) which are committed as part of the same pattern of conduct."

It is important to note that until after the Second World War, references to international crimes were scarce⁷ and were nothing more than general expressions of the need to establish responsibility and accelerate criminal processes accordingly. These documents sought the prosecution of not only those responsible for violations of the laws of war, but also of those who committed atrocities against the civilian population in times of war.

In August 1945, the Allied Powers, meeting in London, signed the agreement that created the International Military Tribunal, commonly known as the Nuremberg court. Article 6 established that the Tribunal would have jurisdiction to try those accused of crimes against peace, war crimes, and crimes against humanity. Crimes against humanity were understood as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

In spite of the advances of the Nuremberg trials, crimes against humanity continued to be considered as accessories to war crimes. They were mainly used to protect the inhabitants of a country from the authorities of an occupying power and had to have a nexus with war crimes or crimes against peace.

⁷ International crimes were mentioned in the Declaration of St. Petersburg in 1868; in a declaration made by France, Great Britain and Russia against the Turkish slaughter of Armenians; and in the declaration made by the committee examining violations of the law and customs of war in the First World War.



The Allied Control Council's adoption of a wider definition of crimes against humanity was an important milestone, although the Control Council only had national jurisdiction in Germany. The definition marked an advance in the understanding of these crimes: "Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecution on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated."

The trials of particular cases (Klaus Barbie in France, Demjanjuk in Israel) affirmed the imprescriptability of crimes against humanity and universal jurisdiction over such crimes.

According to some studies, the next step in the definition of international crimes was the Commission of International Law's 1996 "Draft Code of Crimes Against the Peace and Security of Mankind", elaborated at the request of the General Assembly of the United Nations. In the Draft Code, crimes against humanity are defined as:

"any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) murder; (b) extermination; (c) torture; (d) enslavement; (e) persecution on political, racial, religious or ethnic grounds; (f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) arbitrary deportation or forcible transfer of population; (h) arbitrary imprisonment;(i) forced disappearance of persons;(j) rape, enforced prostitution and other forms of sexual abuse;(k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm (art. 18)."

The most recent advances have been the jurisprudence issuing from the Ad-hoc Tribunals for Rwanda and Yugoslavia, and the Statute of the International Criminal Court.

Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) establishes its competence to try those accused of the following crimes against the civilian populations in times of armed conflict: "(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts."

The Tribunal for Rwanda (ICTR) has competence over the same crimes against civilian populations as the ICTY. However, the ICTR Statute does not require that the crimes be committed during an armed conflict as does the ICTY, but rather "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds (art. 3)."

In the Tadic Appeals Chamber judgment, the ICTY established that demanding proof of armed conflict restricts the reach of the customary law concept of crimes against humanity, since after the Nuremberg trials it is no longer necessary to establish a nexus between crimes against humanity and war crimes or crimes against peace.

The Statute of the International Criminal Court incorporates the ICTY approach ("...any of the following acts when committed as part of a widespread or systematic attack directed against any



civilian population, with knowledge of the attack (art. 7(1))” and, in addition to the crimes listed by the ICTY and ICRC, includes:

Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender...or other grounds that are universally recognized as impermissible under international law; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (art. 7(1)).

The establishment of the ICTY and ICTR was an important step forward for the United Nations Security Council. It clearly established that, under international humanitarian law, individuals have certain judicial obligations to international law, and are directly and individually responsible for breaches of those obligations before a court of first instance.

This is an important advancement with significant implications for the concept of state sovereignty.

The Statutes of the ICTY and ICTR contemplates crimes or infractions derived from Article 3 of Protocol II of the Geneva Conventions.

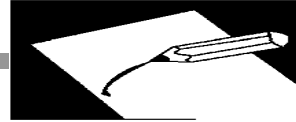
The International Criminal Court contemplates conduct, in the realm of both international and internal armed conflicts, which can be prosecuted at an international level. The ICC statute makes special mention of the character this conduct must have in order to fall within the Court’s jurisdiction. Article 8(1) establishes that “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”

The ICC Statute makes reference to the grave breaches in Article 3 common to the 1949 Geneva Conventions, and to other grave breaches of laws applicable to non-international conflicts, within the framework of international law. The Statute lists the infractions, specifying that they must be committed against persons not participating directly in hostilities, including members of the armed forces who have given up their arms and those who are out of combat due to illness, wounds, detention, or any other reason (see Art. 8(2)(c)(i-iv) and (e)(i-xii)). The applicability of the Statute to internal conflicts is restricted in respect to situations of disturbances or internal tension, such as mutinies, isolated and sporadic acts of violence, or other acts of similar character.

Genocide⁸: In agreement with Article 2 of the Genocide Convention, “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group;(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;(d) Imposing measures intended to prevent births within the group;(e) Forcibly transferring children of the group to another group.”

⁸ Based on Roberge, “Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide” (1997).

http://www.redcross.org.au/ihl/articles/marieclaude_roberge_jurisdiction.htm



The Genocide Convention is applicable in times of peace and times of war and relates to the protection of persons under international humanitarian law and international human rights law. Its definition of genocide has been accepted by the entire international community and has been adopted in the Statutes of the ICC, ICTY, and ICTR.

Crimes against humanity⁹: There is no single definition of crimes against humanity, although they are included in the ICC, ICTY and ICTR Statutes. Taking the elements common to the three Statutes, the following definition can be constructed:

- Crimes against humanity must be committed against a civilian population.
- Crimes against humanity must be committed on a massive or systematic scale.
- Crimes against humanity must be intentional.

This definition is applicable in times of war and times of peace; no relation to armed conflict is necessary. Although there is no specific convention pertaining crimes against humanity, they are crimes under customary international law. As such, States are obligated to prosecute or extradite those accused of crimes against humanity.

Conduct constituting a crime against humanity includes: murder, extermination, slavery, deportation, torture, rape, persecution for political, racial, or religious motives, and other inhumane acts.

A. Crimes against the laws and customs applicable to armed conflict

These crimes constitute “war crimes”, in relation to the Hague Conventions governing war and its limits, as well as to the Geneva Regulations which govern protection of war victims.

B. Breaches of the Hague Conventions and other regulations of war

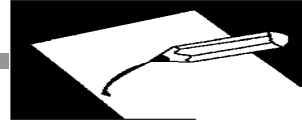
The numerous conventions and protocols codifying the laws of war originate from the 14 Hague Conventions, drafted between 1899 and 1907. These regulations apply to international conflicts and mainly relate to the type of arms used in conflict, and certain prohibited arms.

The Second Hague Convention, relating to the laws and customs applicable to war on land, is the most important. It criminalizes a series of actions, including: the use of poison weapons; illegal killing of enemy troops or civilians of an enemy nation before or after its surrender; declarations of no-quarter; the use of arms causing unnecessary suffering; the improper use of distinguishing military symbols (such as the white flag of surrender); the unnecessary destruction of enemy property; the denial of rights to a captured enemy brought before a court of justice; the attack of undefended villages or towns; looting; etc. Additional conventions further limiting the use of specific arms were later drafted, such as the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, and the 1993 Chemical Weapons Convention.

C. Breaches of the Geneva Conventions

The Geneva Conventions distinguish between grave breaches and other breaches of the Conventions. Grave breaches include: intentional killing; torture, and other inhumane and degrading treatment, including biological experiments; illegal destruction and appropriation of property not justified by military necessity; obligating persons to serve in the armed forces of a

⁹ Based on Roberge, op. cit.



hostile power; depriving a protected person of a right to a fair trial; deportation and illegal transfer of civilians; etc. (Art (8)(2)(a) i-viii)).

These types of breaches are considered part of customary international law and are therefore binding on all States, obligating them to either persecute or extradite alleged perpetrators of such acts.

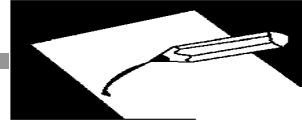
Although the crimes here relate to international armed conflicts, it should be emphasized that Article 3 common to the Geneva Conventions also gives minimum standards for internal armed conflicts. However, these standards, elaborated in the Additional Protocol II of the Geneva Conventions, have an uncertain status, since not all states accept them as customary international law.

In any case, the Statutes of the ICTY and the ICTR contemplate crimes or breaches that derive from Article 3 common to the Geneva Conventions, and the Additional Protocol II, as well as from other serious violations of laws and usages applicable to internal armed conflicts inside the framework of international law. Therefore, despite resistance, the International Criminal Court contemplates conduct in internal armed conflict which can be internationally prosecuted. This conduct includes:

Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; Committing outrages upon personal dignity, in particular humiliating and degrading treatment; Taking of hostages; The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable (art. 8(2)(c)(i-iv)).

Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; Pillaging a town or place, even when taken by assault; Committing rape, sexual slavery, enforced prostitution, forced pregnancy... enforced sterilization, and any other form of sexual violence...; Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; Killing or wounding treacherously a combatant adversary; Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict, etc. (art. 8(2)(e))

Crimes and offenses based on other treaties: Acts included in specific treaties dealing with matters of exceptional preoccupation to the international community, including, among others: apartheid, terrorism, drug trafficking, the security of UN personnel. There was no consensus on including these crimes in the Statute of the International Criminal Courts. Many could be included under other categories already present in the Statute, and including the remainder would risk diluting the Statute.



ANNEX 7

Crimes of Sexual Violence or Gender

- Sexual violence, primarily committed against women, has been historically an instrument of domination. It is present in both times of war and in times of peace; within the public sphere and within the home.
- The international community has progressively recognized the reality of sexual and gender violence and its effects on the preservation of peace, from the standpoint of both international humanitarian law and international human rights law.
- The United Nations World Conference on Human Rights, held in Vienna in 1993, made explicit for the first time that violence against women is a violation of human rights. This was followed by the drafting of the Declaration on the Elimination of Violence against Women and later, in Latin America, the 1994 *Convención Interamericana para Prevenir y Erradicar la Violencia contra la Mujer* (the Inter-American Convention to Prevent and Eradicate Violence against Women, also known as “the Belem do Para Convention”).
- Since the mid-nineties, the definition of sexual crimes has been advanced by the feminist members of the Women’s Caucus for Gender Justice. These advances indicate improvements in international legislation and the creation of jurisprudence with impact on international criminal law and national legislation.
- The inclusion and definition of sexual and gender crimes has been widely debated. This process has been an excellent reflection of the advances and limitations of the international community in the establishment and definition of the canons of justice.

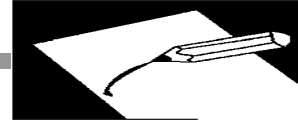
REPORT OF THE SPECIAL RAPPORTEUR ON SYSTEMATIC RAPE, SEXUAL SLAVERY AND SLAVERY-LIKE PRACTICES DURING WARTIME.

Crime: Rape

In regards to the requirement of penetration in the definition of rape, the Special Rapporteur wrote in her final report: “Although this report retains ‘penetration’ in the definition of rape, it is clear that the historic focus on the act of penetration largely derives from a male preoccupation with assuring women’s chastity and ascertaining paternity of children. It is important, nevertheless, to emphasize that all forms of sexual violence, including but not limited to rape, must be condemned and prevented (para. 24).”

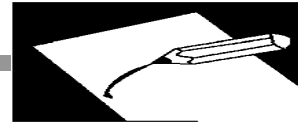
Crime: Sexual Slavery

The Special Rapporteur defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence... Implicit in the definition of slavery are notions concerning limitations on autonomy, freedom of movement and power to decide matters relating to one’s sexual activity (paras. 27 and 29).”



MATRIX OF SEXUAL CRIMES

ICC CRIMES AND DEFINITIONS	INTERNATIONAL CRIMINAL TRIBUNAL YUGOSLAVIA	INTERNATIONAL CRIMINAL TRIBUNAL RWANDA	PROPOSAL CAUCUS FOR GENDER JUSTICE
<p>RAPE</p> <p>Article 7 Crimes against humanity</p> <p>1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack...</p> <p>(g) Rape...</p> <p>(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender...or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.</p> <p>Article 8 War crimes</p> <p>1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes...</p> <p>2. For the purpose of this Statute, "war crimes" means...</p> <p>(a) Grave breaches of the Geneva Conventions...</p> <p>(ii) Torture or inhuman treatment, including biological experiments;</p> <p>(iii) Willfully causing great suffering, or serious injury to body or health...</p> <p>(b) International armed conflicts...</p> <p>(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;</p> <p>(xxii) Committing rape...</p> <p>(c) Armed conflicts not of an international character</p> <p>(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;</p> <p>(ii) Committing outrages upon personal dignity, in particular humiliating</p>	<p>RAPE</p> <p>Definition: Uses the definition from the ICTR <u>Akayesu</u> case and applies it to the <u>Celebici</u> case (para. 479).</p> <p>Rape as torture: in <u>Celebici</u> and <u>Furundzija</u> cases.</p> <p>Rape as any degree of penetration: "the following comprise what may be accepted as the requisite elements of the offence of rape under international criminal law: The sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person (Statement of the Trial Chamber at the Judgment Hearing, <u>Furundzija</u>, 10 December 1998)."</p> <p>Coercive circumstances: "...it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict (<u>Celebici</u>,</p>	<p>RAPE</p> <p>Definition: "...a physical invasion of a sexual nature, committed on a person under circumstances which are coercive (<u>Akayesu</u> para. 598)."</p> <p>Rape as torture: <u>Akayesu</u> para. 597.</p> <p>Coercive circumstances: "...coercive circumstances need not be evidenced by a show of physical force...coercion may be inherent in certain circumstances, such as armed conflict or...military presence...(<u>Akayesu</u> para. 688)"</p>	<p>RAPE</p> <p>Definition: A physical invasion of a sexual nature, including but not limited to penetration no matter how slight, committed on a person under circumstances which are coercive, or without consent. (Adapted from ICTR definition.)</p> <p>Rape and other forms of sexual violence: As well as constituting crimes in and of themselves under Articles 7(g) and 8 (2)(b) (xxii) and 8 (2)(e) (vi) of the ICC statute, rape and sexual violence can also constitute other bodily crimes—such as torture, slavery, genocide, and inhuman acts—which fall under ICC jurisdiction in Articles 6, 7, and 8.</p> <p>Concept of invasion: Extends beyond penetration by the penis; includes oral sex and sexual or reproductive mutilation. (Fusion of <u>Akayesu</u>, <u>Celebici</u>, and <u>Furundzija</u> decisions.)</p> <p>Coercive circumstances: Ought to be used to express the element of violence or compulsion associated with crimes of sexual violence. Should encompass situations of violence or threats of violence, imprisonment, detention, psychological oppression (all recognized in Rule 96 of the Tribunals) as well as other forms of coercion, including extortion, abuse of authority, the deprivation or promise of means of subsistence affecting the victim or third parties. The term "coercion" is preferable to "force" since it admits threatening situations which are less direct but are present in cases under the Court's jurisdiction. In the case of armed conflict, the circumstances are inherently coercive.</p> <p>Once coercive circumstances have been established, the physical resistance or the non-consent of the victim need not be proven.</p>

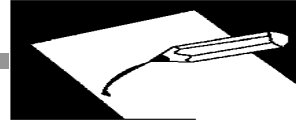


and degrading treatment;	para. 495).”		
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ICC CRIMES AND DEFINITIONS	INTERNATIONAL CRIMINAL TRIBUNAL YUGOSLAVIA	INTERNATIONAL CRIMINAL TRIBUNAL RWANDA	PROPOSAL CAUCUS FOR GENDER JUSTICE
<p>SEXUAL SLAVERY</p> <p>Art. 7... 1... (c) Enslavement... (g) Rape, sexual slavery... 2... (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.</p> <p>Art. 8 2... (b) (xxii) Committing rape, sexual slavery... e) (vi) Committing rape, sexual slavery...</p> <p>Definition of crime in process.</p>	<p>SEXUAL SLAVERY</p> <p>The Tribunal found that in the case of the Muslim women of Foca that enslavement did not necessarily require the buying or selling of a human being.</p>		<p>SEXUAL SLAVERY</p> <p>(i) The exercise of any or all of the powers attaching to the right of ownership</p> <p>(ii) when the exercise of this right includes sexual access through rape or other forms of sexual violence.</p> <p>This definition of sexual slavery includes: rape camps, temporary forced marriages, and other practices signifying the treatment of women as property.</p>
<p>FORCED PROSTITUTION</p> <p>Art. 7 1... (g) Rape, sexual slavery, enforced prostitution...</p> <p>Art. 8 2) (b) (xxii) Committing rape, sexual slavery, enforced prostitution... (e) (vi) Committing rape, sexual slavery, enforced prostitution,</p> <p>Definition of crime in progress.</p>			<p>FORCED PROSTITUTION</p> <p>Forced prostitution is usually considered to be a euphemism for sexual slavery. It is important that the description of the elements does not constitute a diminution of the seriousness of sexual slavery by calling it forced prostitution.</p> <p>Distinguishing between forced prostitution and sexual slavery is not simple. One alternative is to treat forced prostitution as a form of sexual slavery with an additional element: the accused receives pecuniary benefits. The risk is that remunerated slavery be treated as forced prostitution, which is less serious than slavery.</p> <p>There is still no proposed definition for the ICC Statute.</p>

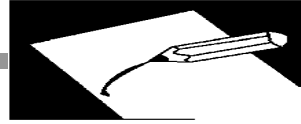


ICC CRIMES AND DEFINITIONS	INTERNATIONAL CRIMINAL TRIBUNAL YUGOSLAVIA	INTERNATIONAL CRIMINAL TRIBUNAL RWANDA	PROPOSAL CAUCUS FOR GENDER JUSTICE
<p>FORCED PREGNANCY</p> <p>Art. 7 1... (g) Rape, sexual slavery, enforced prostitution, forced pregnancy...</p> <p>Art. 8 2) b) xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy... e) vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy...</p> <p>Defintion of crime in progress.</p>			<p>FORCED STERILIZATION</p> <p>(i) Intentionally carry out or cause (ii) without informing the person or without his or her voluntary consent (iii) a medical, surgical or other act (iv) which will result in the person's sterilization.</p> <p>This crime also constitutes: torture, mutilation, experimentation, sexual violence, gender violence and genocide.</p>
<p>OTHER FORMS OF SEXUAL VIOLENCE</p> <p>Art 7 1) g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.</p> <p>Art. 8 2) b) xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy...enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions... e) vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy...enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions...</p>	<p>OTHER FORMS OF SEXUAL VIOLENCE</p> <p>"...international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity (<u>Furundzija</u>, para. 186)."</p>	<p>OTHER FORMS OF SEXUAL VIOLENCE</p> <p>"Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence (<u>Akayesu</u>, para. 688)."</p>	<p>OTHER FORMS OF SEXUAL VIOLENCE</p> <p>The inclusion of "other forms of sexual violence" is intended to link other forms of violence which do not only involve physical invasion or penetration however slight.</p> <p>Other forms of sexual violence should include forms of sexual violence of invasive and non-invasive characters. Non-invasive forms have been recognized as crimes against humanity and serious war crimes violations in <u>Akayesu</u> and <u>Furundzija</u>.</p> <p>It is suggested that the definition of the crime include that the accused committed an act of a sexual nature on a person under coercive circumstances or without consent.</p>



**MATRIX
INCORPORATION OF SEXUAL CRIMES IN GENOCIDE**

ICC CRIMES AND DEFINITIONS	INTERNATIONAL CRIMINAL TRIBUNAL YUGOSLAVIA INTERNATIONAL CRIMINAL TRIBUNAL RWANDA	INTERPRETATIONS OF THE CAUCUS FOR GENDER JUSTICE
<p>Article 6</p> <p>"... 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</p> <p>(a) Killing members of the group;</p> <p>(b) Causing serious bodily or mental harm to members of the group;</p> <p>(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;</p> <p>(d) Imposing measures intended to prevent births within the group;</p> <p>(e) Forcibly transferring children of the group to another group.</p>	<p>The ICTR established that rape and sexual violence, "constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such (<u>Akayesu</u> para. 731)."</p> <p>In <u>Akayesu</u>, the ICTR held that "in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed... it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process (para. 733)."</p> <p>"Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole (<u>Akayesu</u> para. 731)."</p> <p>"Sexual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself... The acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process (<u>Akayesu</u> paras. 732 and 733)."</p> <p>"...the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages (<u>Akayesu</u> para. 507)."</p>	<p>In the opinion of the Caucus, the general principle that sexual violence can constitute a genocidal act is already established in the elements of the crime of genocide.</p> <p>Sexual violence can be the means of causing death in the context of genocide</p> <p>Under customary international law, rape and other forms of sexual violence are already recognized as inflictors of serious physical and mental harm in the victim, and in many situations, as torture.</p> <p>The experiences of rape and sexual violence are calculated to break the will to survive.</p> <p>The crime of forced pregnancy, recognized by the ICC, can frequently be an instrument of genocide.</p> <p>Forced pregnancy, through the manipulation of patriarchal customs which establish group identity through the father's identity, and which imposes the identity of an enemy group on a child born within a group, is another form of forcibly transferring children of the group to another group.</p>



ANNEX 8

Group One: Victim participation in the trial

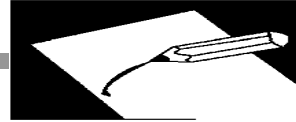
What is the position of the victim under with international law?
Can victims participate in the criminal trial under domestic judicial regulations?
What role do victims have in the initiation of the investigation and in the accusation or complaint?
Can victims participate in all points of the trial and afterwards?

Group Two: Victim and witness protection

Does the domestic judicial regulation recognize the importance of victim and witness protection during criminal trials?
Does the State provide specialized services to assist victims and witnesses?
What obligations does the prosecutor have towards the victims?
What obligations do the Courts have towards the victims?

Group Three: Reparations for the victims

What means for reparations to victims is provided in domestic law?
How is the enforcement of reparations due to victims provided for in domestic law?
What role does the State have in the enforcement of reparations?



ANNEX 9

AMNESTY INTERNATIONAL
The International Criminal Court
Fact sheet 6
Ensuring justice for victims

“Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered.”

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 4

There is currently a resurgence of international interest in ensuring that criminal justice takes better account of victims and their rights. This is reflected in the Rome Statute of the International Criminal Court (Statute), which enshrines three key principles: victim participation in the proceedings, protection of victims and witnesses and the right to reparations. The Statute requires the International Criminal Court (ICC) at all times to ensure that the measures taken are not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.

I. PARTICIPATION IN THE PROCEEDINGS

What is the place of the victim under the Statute?

The Preamble indicates that ensuring justice for victims lies at the heart of the Statute, by recalling “that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. The Statute recognizes that the interests of justice and the interests of victims are complementary. The overriding interest of victims is likely to be the interest in seeing that crimes are effectively investigated and that justice is done.

Can victims participate in the proceedings?

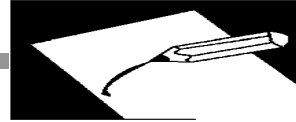
The ICC does not treat victims as passive objects of protection or instruments of the prosecution. The Statute recognizes the contribution that victims can make to the criminal process and the importance of that process to victims. Accordingly, Article 68 (3) requires the ICC to permit the views and concerns of victims to be presented and considered at appropriate stages in the proceedings.

What is the role of victims in initiating an investigation or prosecution?

Article 15 authorizes the Prosecutor to initiate investigations based on information from any source, including from victims. Victims may make representations when the Pre-Trial Chamber is deciding whether to authorize an investigation, and must be informed when the Prosecutor or the Pre-Trial Chamber decide not to proceed with an investigation.

Can victims participate at any stage of the trial and post-trial proceedings?

Article 68 (3) provides that the ICC shall permit victims to present their views and concerns to the ICC for its consideration at any appropriate stage of the proceedings and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.



Appropriate stages of proceedings should encompass the trial, sentencing, award of reparations and post-trial proceedings, including the appeal, sentence reduction hearings, review and release hearings.

II. PROTECTION OF VICTIMS AND WITNESSES

Does the Statute recognize the importance of protecting victims and witnesses?

The Statute recognizes that measures to guarantee the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and their families are essential to support the ICC's credibility and legitimacy.

Will there be a special unit to assist victims and witnesses?

Article 43 (6) provides for the establishment of a Victims and Witnesses Unit in the ICC Registry. It will provide protective measures, security arrangements, counseling and other appropriate assistance to victims, witnesses who appear before the ICC and others, such as family members, who are at risk because of such testimony. Article 68 (4) authorizes the Unit to advise the Prosecutor and the rest of the ICC on such measures. It will include experienced staff, trained to deal with traumatized individuals, including victims of sexual violence and child victims.

What are the responsibilities of the Prosecutor to victims under the Statute?

Article 54(1)(b) requires the Prosecutor during the course of an investigation or prosecution to respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children. In addition, Article 68(1) requires the Prosecutor to take appropriate measures, particularly during the investigations and prosecutions of crimes to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Article 68(5) further provides that the Prosecutor may withhold until the trial evidence and information, by submitting a summary thereof, if it may lead to grave endangerment of the security of the witness or his/her family.

What are the responsibilities of the Pre-Trial Chamber and the Trial Chamber to victims?

Article 57(3) states that the Pre-Trial Chamber may, where necessary, provide for the protection and privacy of victims and witnesses and Article 68(1) authorizes the Trial Chamber to take protective measures. Article 68(3) provides that the ICC may also protect the identity of victims and witnesses from the press and public by conducting any part of the proceedings by video camera or allow the presentation of evidence by electronic or other special means.

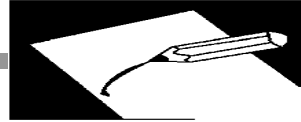
III. REPARATIONS

Can the ICC award reparations to victims?

In addition to bringing the perpetrator to justice, which is itself a crucially important form of reparations, the ICC is required under Article 75 (1) to establish principles relating to reparations, and it may order a convicted person to provide reparations to victims, including restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition, and any other type of reparations to victims it deems appropriate in the particular case.

How will such awards be made by the ICC?

Article 75 (2) provides that the ICC may order a convicted person to make reparations directly to victims or through an ICC Trust Fund. Before making such an award, the ICC may invite, and must take account of, the views of the convicted person, victim and interested persons or states. To ensure that assets are not concealed or transferred to avoid paying reparations, the ICC can

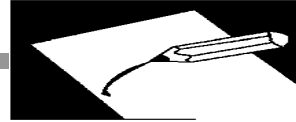


take protective measures to ensure that assets of an accused are preserved pending the outcome of the trial, so that they can be forfeited, particularly for the benefit of victims, if the person is convicted.

What is the role of states in reparations?

States parties agree under Article 75 (2) to give effect to any ICC decision on reparations. In some cases, states parties will also have an obligation under international or national law to ensure that they themselves provide reparations to the victims, either when the convicted person is unable to make reparations or when the state itself is also responsible for the crime.

A publication of the International Justice Project



ANNEX 10

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

http://www.unhchr.ch/html/menu3/b/h_comp49.htm

Adopted by General Assembly resolution 40/34 of 29 November 1985

A. Victims of Crime

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;



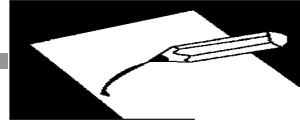
- (c) Providing proper assistance to victims throughout the legal process;
 - (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.
9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.
10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.
11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
- (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
 - (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.
13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.



Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

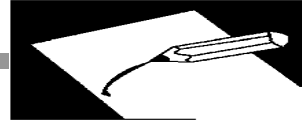
B. Victims of Abuse of Power

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.



ANNEX 11

Codification of international rules on internally displaced persons

by Robert K. Goldman

An area where both human rights and humanitarian law considerations are being taken into account

This past April the Representative of the United Nations Secretary-General on Internally Displaced Persons, Francis M. Deng, presented to the UN Commission on Human Rights, at its 54th session, a report with an addendum entitled Guiding Principles on Internal Displacement [1] (hereinafter "Guiding Principles"). The Commission adopted by consensus a resolution [2] co-sponsored by more than 50 States which, inter alia, took note of the decision of the Inter-Agency Standing Committee welcoming the Guiding Principles and encouraging its members to share them with their Executive Boards, and also of Mr. Deng's stated intention to make use of these principles in his dialogue with governments and intergovernmental and non-governmental organizations. These principles are an important milestone in the process of establishing a generally accepted normative framework for the protection of the estimated 20 to 25 million internally displaced persons worldwide.

The Guiding Principles are largely the outgrowth of the conclusions of an elaborate study entitled *Compilation and Analysis of Legal Norms*, which was prepared by a team of legal experts under the direction of Mr. Deng and presented to the Commission on Human Rights in 1996.³ The purpose of the study was to determine the extent to which international human rights law, international humanitarian law and refugee law, by analogy, meet the basic needs of the internally displaced in three recognized situations in international law. These situations, which cover most cases of internal displacement, are: (1) situations of tension and disturbances, or disasters in which human rights law is applicable; (2) situations of non-international armed conflict governed by the central principles of humanitarian law and by many human rights guarantees; and (3) situations of inter-State armed conflict in which the detailed provisions of humanitarian law become primarily operative and many fundamental human rights norms remain applicable.

The study concluded that while existing international law covers, albeit in a dispersed and diffuse manner, many aspects of particular relevance to internally displaced persons, there are many areas in which the law provides insufficient legal protection owing to inexplicit articulation or normative and other kinds of gaps. One example of a normative gap is the fact that no international instrument contains an express right not to be arbitrarily displaced. Other such gaps are the absence of a right to restitution of property lost (or compensation for its loss) as a consequence of displacement during armed conflict situations, a right to have access to protection and assistance during displacement, and a right to personal documentation. Further gaps occur where a legal norm is not applicable in all circumstances. For example, because human rights law is generally binding only on State agents, the internally displaced lack sufficient protection in situations of tension and disturbances where violations are perpetrated by non-State players. Another instance of insufficient protection occurs in situations falling below the threshold of application of humanitarian law, in which restriction or even derogation of human rights guarantees might be permissible.



In addition, there are numerous areas where a general norm exists, but a corollary, more specific right relevant to the needs of the internally displaced has not been articulated. For example, although there is a general norm guaranteeing freedom of movement, there is no explicit right to find refuge in a safe part of the country, nor any express guarantee against the forcible return of internally displaced persons to dangerous areas within their own country. Another example can be found in the area of non-discrimination, where treaties prohibit discrimination, *inter alia*, on the basis of any "other status" of the person concerned. Although this can be interpreted to include the status of being internally displaced, no authoritative body has yet rendered such a decision. Similarly, although human rights treaties prohibit arbitrary detention, the preconditions for lawful detention of internally displaced persons in closed camps are unclear. Finally, there are "ratification" gaps which are still numerous. Such gaps can result in a vacuum as regards legal protection for the internally displaced in those States that have not ratified key human rights treaties and/or the Additional Protocols to the 1949 Geneva Conventions. These findings were sufficiently compelling to prompt Francis Deng to ask his team of legal experts to assist him in the formulation of a set of guiding principles specifically tailored to meet the needs of internally displaced persons. This document would both restate general principles of protection in more specific detail and address the grey areas and gaps identified in the Compilation and Analysis of Legal Norms. It was also felt that restating and clarifying legal norms in a single coherent document could reinforce and strengthen existing protection. Significantly, both the International Committee of the Red Cross and the Office of the UN High Commissioner for Refugees endorsed the preparation of guiding principles relating to the internally displaced on the basis of the conclusions of this study.

The Guiding Principles on Internal Displacement consist of 30 principles which are comprehensive in scope. They identify key rights and guarantees relevant to protecting persons against forced displacement, and to protecting and assisting them both during displacement and during their return or resettlement and reintegration. For the purposes of these principles, internally displaced persons are:

"persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border." [4]

As stated in the document itself, the Guiding Principles reflect and are consistent with international human rights and international humanitarian law. Indeed, many of them, particularly those relating to protection during displacement, are essentially declaratory of customary law. Most of the principles blend basic humanitarian law rules and principles with key human rights guarantees, thereby underscoring the shared purpose of both bodies of law, that is, to safeguard human life and dignity. Many of the principles are either modeled on or are near verbatim transcriptions of provisions that appear in humanitarian and human rights treaties. In addition, the principles relating to return, resettlement and reintegration were largely inspired by and reflect certain basic tenets of refugee law.

It is important to note that these principles do not alter, replace or modify existing international law or rights granted to individuals under domestic law. Rather, they are designed in large measure to provide guidance on how the law should be interpreted and applied during all phases of displacement. By calling on "all authorities and international actors" to respect their obligations under international law, including human rights and humanitarian law, the principles also seek to prevent and avoid conditions that might lead to displacement in the future.

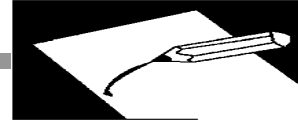


As the most comprehensive, if not authoritative, restatement of norms specifically applicable to the internally displaced, the Guiding Principles should be disseminated as widely as possible. Such dissemination is particularly necessary since the rights of the internally displaced are often disregarded or even violated simply because of lack of awareness. They should prove an indispensable tool for orienting and facilitating the work of States and intergovernmental and non-governmental organizations providing protection, assistance and other necessary services to the internally displaced.

From *International Review of the Red Cross* 324 (September 30, 1998) 463-466.

Notes:

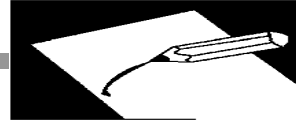
1. Text reprinted infra, p. 545.
2. UN Doc. E/CN.4/1998/53/Add. 2 of 17 April 1998.
3. UN Doc. E/CN.4/1996/52/Add. 2.
4. Introduction, para.2.



ANNEX 12

Work Guide One

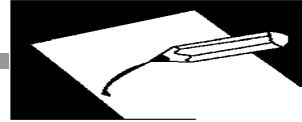
- Name one person to lead the discussion.
- Read the “Guiding Principles on Internal Displacement.”
- Brainstorm on what basic rights internally displaced persons should have.
- Name one person to be rapporteur and report the results of the discussion to the rest of the group.



ANNEX 13

Work Guide Two

- Name one person to lead the discussion.
- Read the “Guiding Principles on Internal Displacement.”
- Identify the basic rights for internally displaced persons contained in the Guiding Principles.
- Name one person to be rapporteur and report the results of the discussion to the rest of the group.



ANNEX 14

[UN Doc. E/CN.4/1998/53/Add., 11 February 1998. The Human Rights Commission took note of these Guiding Principles; see UNCHR Resolution 50, April 17, 1998.]

Guiding Principles on Internal Displacement

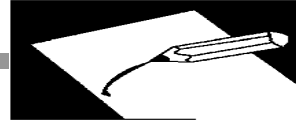
Introduction - Scope and Purpose

1. These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration.
2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.
3. These Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to:
 - (a) The Representative of the Secretary-General on internally displaced persons in carrying out his mandate;
 - (b) States when faced with the phenomenon of internal displacement;
 - (c) All other authorities, groups and persons in their relations with internally displaced persons; and
 - (d) Intergovernmental and non-governmental organizations when addressing internal displacement.
4. These Guiding Principles should be disseminated and applied as widely as possible.

Section I. General Principles

Principle 1

1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.
2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.



Principle 2

1. These Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction. The observance of these Principles shall not affect the legal status of any authorities, groups or persons involved.
2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.

Principle 3

1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.
2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.

Principle 4

1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.
2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

Section II. Principles Relating to Protection From Displacement

Principle 5

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

Principle 6

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
2. The prohibition of arbitrary displacement includes displacement:
 - (a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;



- (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;
 - (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
 - (e) When it is used as a collective punishment.
3. Displacement shall last no longer than required by the circumstances.

Principle 7

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.
2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.
3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:
 - (a) A specific decision shall be taken by a State authority empowered by law to order such measures;
 - (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
 - (c) The free and informed consent of those to be displaced shall be sought;
 - (d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;
 - (e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and
 - (f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

Principle 8

Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.



Principle 9

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

Section III. Principles Relating to Protection During Displacement

Principle 10

1. Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against:

- (a) Genocide;
- (b) Murder;
- (c) Summary or arbitrary executions; and
- (d) Enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.

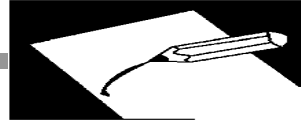
Threats and incitement to commit any of the foregoing acts shall be prohibited.

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:

- (a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;
- (b) Starvation as a method of combat;
- (c) Their use to shield military objectives from attack or to shield, favour or impede military operations;
- (d) Attacks against their camps or settlements; and
- (e) The use of anti-personnel landmines.

Principle 11

1. Every human being has the right to dignity and physical, mental and moral integrity.
2. Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against:



(a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault;

(b) Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children; and

(c) Acts of violence intended to spread terror among internally displaced persons. Threats and incitement to commit any of the foregoing acts shall be prohibited.

Principle 12

1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.

2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.

3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.

4. In no case shall internally displaced persons be taken hostage.

Principle 13

1. In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities.

2. Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement. In particular any cruel, inhuman or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances.

Principle 14

1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.

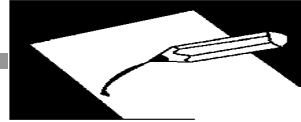
2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

Principle 15

Internally displaced persons have:

(a) The right to seek safety in another part of the country;

(b) The right to leave their country;



(c) The right to seek asylum in another country; and

(d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

Principle 16

1. All internally displaced persons have the right to know the fate and whereabouts of missing relatives.

2. The authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.

3. The authorities concerned shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully.

4. Grave sites of internally displaced persons should be protected and respected in all circumstances. Internally displaced persons should have the right of access to the grave sites of their deceased relatives.

Principle 17

1. Every human being has the right to respect of his or her family life.

2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.

3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.

4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

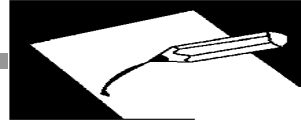
Principle 18

1. All internally displaced persons have the right to an adequate standard of living.

2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:

(a) Essential food and potable water;

(b) Basic shelter and housing;



(c) Appropriate clothing; and

(d) Essential medical services and sanitation.

3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

Principle 19

1. All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.

2. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counseling for victims of sexual and other abuses.

3. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

Principle 20

1. Every human being has the right to recognition everywhere as a person before the law.

2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.

3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

Principle 21

1. No one shall be arbitrarily deprived of property and possessions.

2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:

(a) Pillage;

(b) Direct or indiscriminate attacks or other acts of violence;

(c) Being used to shield military operations or objectives;

(d) Being made the object of reprisal; and



(e) Being destroyed or appropriated as a form of collective punishment.

3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

Principle 22

1. Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:

- (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;
- (b) The right to seek freely opportunities for employment and to participate in economic activities;
- (c) The right to associate freely and participate equally in community affairs;
- (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right; and
- (e) The right to communicate in a language they understand.

Principle 23

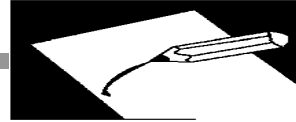
- 1. Every human being has the right to education.
- 2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
- 3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
- 4. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.

Section IV. Principles Relating to Humanitarian Assistance

Principle 24

- 1. All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination.
- 2. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.

Principle 25



1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

Principle 26

Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence.

Principle 27

1. International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.
2. The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.

Section V. Principles Relating to Return, Resettlement and Reintegration

Principle 28

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

Principle 29

1. Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.
2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions



which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

Principle 30

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.



ANNEX 15

THE INTERNATIONAL CRIMINAL COURT

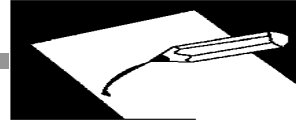
OVERVIEW

It has been 50 years since the United Nations first recognized the need to establish an international criminal court, to prosecute crimes such as genocide. In resolution 260 of 9 December 1948, the General Assembly, "Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required", adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article I of that convention characterizes genocide as "a crime under international law", and article VI provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . ." In the same resolution, the General Assembly also invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide."

Following the Commission's conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible, the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 and a revised draft statute in 1953. The General Assembly, however, decided to postpone consideration of the draft statute pending the adoption of a definition of aggression.

Since that time, the question of the establishment of an international criminal court has been considered periodically. In December 1989, in response to a request by Trinidad and Tobago, the General Assembly asked the International Law Commission to resume work on an international criminal court with jurisdiction to include drug trafficking. Then, in 1993, the conflict in the former Yugoslavia erupted, and war crimes, crimes against humanity and genocide -- in the guise of "ethnic cleansing" -- once again commanded international attention. In an effort to bring an end to this widespread human suffering, the UN Security Council established the ad hoc International Criminal Tribunal for the Former Yugoslavia, to hold individuals accountable for those atrocities and, by so doing, deter similar crimes in the future.

Shortly thereafter, the International Law Commission successfully completed its work on the draft statute for an international criminal court and in 1994 submitted the draft statute to the General Assembly. To consider major substantive issues arising from that draft statute, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995. After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference. The Preparatory Committee, which met from 1996 to 1998, held its final session in March and April of 1998 and completed the drafting of the text.



At its fifty-second session, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, subsequently held in Rome, Italy, from 15 June to 17 July 1998, "to finalize and adopt a convention on the establishment of an international criminal court".

Peace and Justice

One of the primary objectives of the United Nations is securing universal respect for human rights and fundamental freedoms of individuals throughout the world. In this connection, few topics are of greater importance than the fight against impunity and the struggle for peace and justice and human rights in conflict situations in today's world. The establishment of a permanent international criminal court (ICC) is seen as a decisive step forward. The international community met in Rome, Italy, from 15 June to 17 July 1998 to finalize a draft statute which, when ratified, will establish such a court.

Why Do we Need an International Criminal Court?

... To achieve justice for all

An international criminal court has been called the missing link in the international legal system. The International Court of Justice at The Hague handles only cases between States, not individuals. Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights often go unpunished. In the last 50 years, there have been many instances of crimes against humanity and war crimes for which no individuals have been held accountable. In Cambodia in the 1970s, an estimated 2 million people were killed by the Khmer Rouge. In armed conflicts in Mozambique, Liberia, El Salvador and other countries, there has been tremendous loss of civilian life, including horrifying numbers of unarmed women and children. Massacres of civilians continue in Algeria and the Great Lakes region of Africa.

... To end impunity

The Judgment of the Nürnberg Tribunal stated that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" -- establishing the principle of individual criminal accountability for all who commit such acts as a cornerstone of international criminal law. According to the Draft Code of Crimes against the Peace and Security of Mankind, completed in 1996 by the International Law Commission at the request of the General Assembly, this principle applies equally and without exception to any individual throughout the governmental hierarchy or military chain of command. And the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations in 1948 recognizes that the crime of genocide may be committed by constitutionally responsible rulers, public officials or private individuals.



... To help end conflicts

In situations such as those involving ethnic conflict, violence begets further violence; one slaughter is the parent of the next. The guarantee that at least some perpetrators of war crimes or genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end. Two ad hoc international criminal tribunals, one for the former Yugoslavia and another for Rwanda, were created in this decade with the hope of hastening the end of the violence and preventing its recurrence.

... To remedy the deficiencies of ad hoc tribunals

The establishment of an ad hoc tribunal immediately raises the question of "selective justice". Why has there been no war crimes tribunal for the "killing fields" in Cambodia? A permanent court could operate in a more consistent way.

Reference has been made to "tribunal fatigue". The delays inherent in setting up an ad hoc tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can escape or disappear; and witnesses can relocate or be intimidated. Investigation becomes increasingly expensive, and the tremendous expense of ad hoc tribunals may soften the political will required to mandate them.

Ad hoc tribunals are subject to limits of time or place. In the last year, thousands of refugees from the ethnic conflict in Rwanda have been murdered, but the mandate of that Tribunal is limited to events that occurred in 1994. Crimes committed since that time are not covered.

... To take over when national criminal justice institutions are unwilling or unable to act

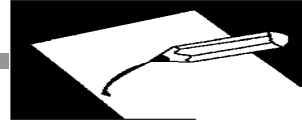
Nations agree that criminals should normally be brought to justice by national institutions. But in times of conflict, whether internal or international, such national institutions are often either unwilling or unable to act, usually for one of two reasons. Governments often lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia. Or national institutions may have collapsed, as in the case of Rwanda.

... To deter future war criminals

Most perpetrators of war crimes and crimes against humanity throughout history have gone unpunished. In spite of the military tribunals following the Second World War and the two recent ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda, the same holds true for the twentieth century. That being said, it is reasonable to conclude that most perpetrators of such atrocities have believed that their crimes would go unpunished. Effective deterrence is a primary objective of those working to establish the international criminal court. Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment -- to heads of State and commanding officers as well as to the lowliest soldiers in the field or militia recruits -- it is hoped that those who would incite a genocide; embark on a campaign of ethnic cleansing; murder, rape and brutalize civilians caught in an armed conflict; or use children for barbarous medical experiments will no longer find willing helpers.



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ANNEX 16

International Criminal Court

Aspects debated during the creation of the International Criminal Court

Regarding the structure of the Court: Jurisdiction and Prosecutorial independence

Court Jurisdiction: The court has jurisdiction with respect to four principal crimes: genocide, crimes against humanity, war crimes and crimes of aggression, with respect to the State in whose territory the crime in question was committed, or the State to which the person investigated or tried belongs. If one of these States is not part of the Treaty, that State may submit a declaration by which it accepts the exercise of jurisdiction by the Court with respect to the crime in question. The State need not consent when the Security Council refers a particular case to the prosecutor.

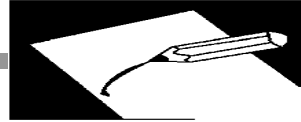
Unfortunately, the proposal to grant automatic jurisdiction to the Court when the State is bound by the Statute was not accepted. Without automatic jurisdiction, the Court will not be able to take steps to try an accused in a territory which is not his or hers; this will only be possible when the Security Council refers the case to the prosecutor or when the State where the accused is located chooses to have the accused tried and can bring the suspect to trial before the courts of its country. This implies that the States' national legislation should permit trial before foreign courts, for crimes committed in another country. To date, few States have approved such legislation.

An Independent Prosecutor: In the Statute, the Prosecutor is granted the power to initiate an investigation with respect to the four crimes under the jurisdiction of this Court. Once the Prosecutor decides that there is reasonable basis to begin proceedings, the Prosecutor will present a request for authorization to the Pre-Trial Chamber. If the Chamber authorizes the investigation, the Prosecutor will notify the interested Parties and States. In the month following receipt of notification, the State may notify the prosecutor that it is conducting an investigation or trial of the case at the national level, in which case the prosecutor will waive its jurisdiction in favor of the State's. Nevertheless, a Prosecutor may request that the Court make a pronouncement regarding an issue of jurisdiction and admissibility.

Regarding jurisdiction: Types of jurisdiction and compatibility with national jurisdiction

Complementarity between national and international jurisdiction: In accordance with the principle of complementarity, the International Criminal Court will allow States to assume their basic responsibility of action; the Court will only begin proceedings if the national courts have not been able to do so. Nevertheless, when the national courts cannot begin proceedings due to the nonexistence or inefficiency of the national court systems, the permanent International Criminal Court may carry out its functions.

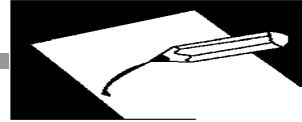
So that the Court may be truly effective, the Statute must be ratified by 60 States. At the same time, due to the principle of complementarity between the ICC and the national criminal courts, there must be a redoubling of efforts to elaborate national standards applying the universal obligation to try those suspected of war crimes, regardless of the accuseds' location



Regarding proceedings: Witness protection and Reparations to victims

Regarding witness protection, appropriate provisions exist to protect witnesses from any action against them during a Court trial. What is debated is the extent of that protection, as well as its dependence on the prosecutor or on a specialized unit.

Regarding reparations to victims, the groups of organized civil society in the Caucus have exerted pressure so that the victims may actually play a role in the Court and so that the reparations not be submitted to the State, which is often inefficient. The debate on reparations has included such aspects as rehabilitation and compensation.



ANNEX 17

Amnesty International
May 1998
AI Index: IOR 40/12/98

THE INTERNATIONAL CRIMINAL COURT

16 fundamental principles for a just, fair and effective international criminal court

For more than half a century since the Nuremberg and Tokyo trials ended, national prosecutors and courts have largely failed to bring to justice those responsible for the crimes of genocide, other crimes against humanity and serious violations of humanitarian law. The international community has recognized, therefore, that a permanent international criminal court is necessary to complement national criminal jurisdictions by investigating and prosecuting these three core crimes when national prosecutors are unable or unwilling to do so, serving as a model of international justice and acting as a catalyst for national prosecutors and courts to fulfill their primary responsibility to bring those responsible for these crimes to justice. On 15 June 1998, the world's governments meet in Rome to open a five-week diplomatic conference to adopt a statute for a permanent international criminal court.

If the court is to be a just, fair and effective institution, there are certain fundamental principles which must be reflected in its statute, rules and practice. There are a wide variety of forms which the court could take, drawing from many criminal justice systems, but whatever solutions are found must be consistent with each of the 16 fundamental principles set forth below.

Although these 16 principles are largely based upon principles being considered and developed by a number of African governments and non-governmental organizations, they reflect principles which have been included in the declarations and statements of an increasing number of governments, intergovernmental organizations, non-governmental organizations and independent experts from all parts of the world. Indeed, many of these principles have appeared in one form or another in statements by the Caribbean Community (CARICOM); the Council of Europe Parliamentary Assembly; the Dakar Declaration on the Establishment of the International Criminal Court, adopted by 25 African governments, as well as by African and international non-governmental organizations, on 6 February 1998; the European Parliament; the League of Arab States; the Rio Group of Latin American states; and the Southern African Development Community (SADC).

If each of the following principles are fully reflected in the statute, rules and practice of the court, the court could be an effective complement to national criminal justice systems. If any of them are omitted, the court risks being an illusory remedy and, perhaps, even a setback for the rule of law and international justice. Amnesty International fully endorses each of these principles without any reservation and is calling upon every government around the world to pledge publicly that it will ensure that the diplomatic conference incorporates each of these principles in their entirety in the statute of the permanent international criminal court. No government which is serious about the establishment of an effective and independent court should be able to refuse to make this pledge.



16 FUNDAMENTAL PRINCIPLES FOR A JUST, FAIR AND EFFECTIVE INTERNATIONAL CRIMINAL COURT

1. The court should have jurisdiction over the crime of genocide. The statute should provide that the court has jurisdiction over this crime as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, in peace as well as during armed conflict.

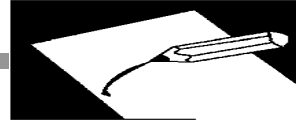
2. The court should have jurisdiction over other crimes against humanity. The court should have jurisdiction over other crimes against humanity, including the following crimes when committed on a systematic basis or large-scale (there should be no requirement that they have to be both systematic and large scale): murder; extermination; forced disappearance of persons; torture; rape, enforced prostitution and other sexual abuse; arbitrary deportation across national frontiers and forcible transfer of population within national frontiers; arbitrary detention; enslavement; persecution on political, racial, religious or other grounds; and other inhumane acts. The court should have jurisdiction over these crimes whether they have been committed in peace or armed conflict.

3. The court should have jurisdiction over serious violations of humanitarian law in international and non-international armed conflict. The court should have jurisdiction over serious violations of humanitarian law in international armed conflicts, including: all grave breaches of the Geneva Conventions of 1949, grave breaches and denials of fundamental guarantees of Additional Protocol I to the Geneva Conventions and violations of the 1907 Hague Convention IV and its Regulations. The court should also have jurisdiction over serious violations of humanitarian law in non-international armed conflicts, including violations of common Article 3 of the Geneva Conventions and Additional Protocol II to the Geneva Conventions. There should be no threshold, such as a requirement that the violations of humanitarian law in either type of conflict were part of a plan or policy or part of a large-scale commission of such crimes. Similarly, there should be no threshold for violations of common Article 3.

4. The court must ensure justice for women. The statute should include jurisdiction over rape, enforced prostitution and other sexual abuse as crimes against humanity, when committed on a systematic basis or large scale, and as serious violations of humanitarian law in international and non-international armed conflict. The prosecutor must investigate these and other crimes against women and all staff in all organs of the court should receive training relevant to the investigation and prosecution of crimes against women. The court must be able to take certain measures to protect women victims and their families from reprisals and unnecessary anguish to which they might be exposed in a public trial, without prejudicing the rights of suspects and accused to a fair trial. The statute should also facilitate the selection of women with a view to achieving gender balance in all organs of the court.

5. The court must have inherent (automatic) jurisdiction. The statute should provide that all states when ratifying or acceding to the statute consent to the court having inherent (that is, automatic) jurisdiction over the three core crimes of genocide, other crimes against humanity and serious violations of humanitarian law. No further state consent should be required. Since such inherent jurisdiction is concurrent with that of states, the court would exercise its jurisdiction only when states were unable or unwilling to exercise their jurisdiction.

6. The court must have the same universal jurisdiction over these crimes as any of its states parties. Under international law, each of these three core crimes - genocide, other crimes against humanity and serious violations of humanitarian law - are crimes of universal jurisdiction. That



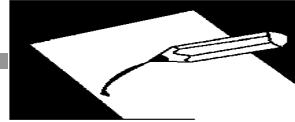
means that any state may exercise jurisdiction over a person suspected of having committed one of these crimes and bring anyone responsible for such crimes to justice no matter where the crime was committed. If the court is to be an effective complement to national courts, and not a weaker court, then it must have the same universal jurisdiction over these crimes as any one of the states parties.

7. The court must have the power in all cases to determine whether it has jurisdiction and whether to exercise it without political interference from any source. If the court is to be an effective complement to national courts when they are unable or unwilling to bring those responsible to justice for these crimes, it must be able to determine when they are unable or unwilling to do so. Otherwise the court will be at the mercy of states which are unable or unwilling to bring those responsible for the worst crimes in the world and which are also unwilling to have any other court do so.

8. The court should be an effective complement to national courts when these courts are unable or unwilling to bring to justice those responsible for these grave crimes. Every provision of the proposed statute must be tested against this requirement that the court be effective. Many of the proposals by states would make the court less effective than the national courts of states parties.

9. An independent prosecutor should have the power to initiate investigations on his or her own initiative, based on information from any source, subject only to appropriate judicial scrutiny, and present search and arrest warrants and indictments to the court for approval. There is only one truly effective method to ensure that all cases which should be brought before the court are brought. An independent prosecutor should be able to initiate investigations of any crime within the court's jurisdiction on his or her own initiative, based on information from any source, and present search and arrest warrants and indictments to the court for approval, without state interference. The Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda (Yugoslavia and Rwanda Tribunals) has the power to initiate investigations of any crime which took place within the tribunals' jurisdiction on his or her initiative, and present indictments to the tribunals for approval, without any selection or prior interference by the Security Council or states, although states are free to seek judicial review of court orders. There are advantages to permitting the Security Council to refer situations involving threats to or breaches of international peace and security to the prosecutor for investigation pursuant to Chapter VII of the UN Charter, as the requests and orders of the court would benefit from the Security Council's Chapter VII enforcement powers, but referrals and state complaints should only be a supplement to other sources for the prosecutor. Both the Security Council and states are political bodies and likely to select situations on political, not legal, grounds. Moreover, neither are likely to submit many situations. The Security Council has established only two ad hoc tribunals in more than half a century and states rarely file complaints against other states under state complaint mechanisms of human rights treaties.

10. No political body, including the Security Council, or states, should have the power to stop or even delay an investigation or prosecution under any circumstances whatsoever. There is no legitimate ground under international law or morality to obstruct justice by stopping or delaying investigations of crimes of genocide, other crimes against humanity or serious violations of humanitarian law. Indeed, all states have obligations to repress these crimes. Justice must never be a bargaining chip in peace negotiations. Therefore, no national amnesty or pardon which has prevented justice and the emergence of the truth may prevent the international court from bringing those responsible for these crimes under international law to justice. The Security Council has never sought to prevent the International Court of Justice or national courts from



hearing cases involving situations which it was considering under its Chapter VII powers to address threats to or breaches of international peace and security. Any delays in an investigation would let memories of witnesses fade and facilitate the destruction of evidence and intimidation of witnesses.

11. To ensure that justice is done, the court must develop effective victim and witness protection programs, involving the assistance of all states parties, without prejudicing the rights of suspects and the accused. The court, in close cooperation with states, must be able to take certain security measures to protect witnesses and victims and their families from reprisals. Such measures must not prejudice the rights of suspects and accused.

12. The court must have the power to award victims and their families reparations, including restitution, compensation and rehabilitation. As recognized in a wide variety of international instruments, including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, victims of grave human rights violations and their families have the right to reparations, including restitution, compensation and rehabilitation. The court itself should have the power to award such reparations since it is unlikely that national courts, which were unable or unwilling to bring the person responsible to justice, will be able or willing to award reparations or to enforce the award.

13. The statute must ensure suspects and accused the right to a fair trial in accordance with the highest international standards at all stages of the proceedings. If the court is to be effective, particularly in the situations in which these crimes occur, justice must not only be done, but be seen to be done. Therefore, the court must be scrupulous in its respect for the highest possible international standards for fair trial. These standards include those found in Articles 9, 10 and 11 of the Universal Declaration of Human Rights; Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights; the UN Standard Minimum Rules for the Treatment of Prisoners; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Articles 7 and 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the UN Basic Principles on the Independence of the Judiciary; the UN Basic Principles on the Role of Lawyers; and the UN Guidelines on the Role of Prosecutors.

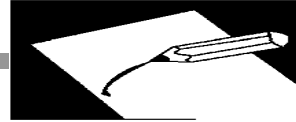
14. All states parties, including their courts and officials, must provide full cooperation without delay to the court at all stages of the proceedings. Like the two ad hoc Yugoslavia and Rwanda Tribunals, the court will be largely dependent upon state cooperation, whether this involves voluntary measures such as on-site visits and interviews with witnesses, or compulsory process to search premises, compel testimony and production of documents or to arrest and transfer persons. Therefore, all states parties must provide the court the same cooperation and compliance that their executive authorities provide their national courts. To ensure that the court is not frustrated before it can begin, full cooperation must be provided in the period before the court determines whether it has jurisdiction and should exercise it. States may not refuse to comply with court orders or requests to provide information or to transfer persons to the court on any of the traditional grounds for refusal in state-to-state cooperation. The court must have the power to determine whether a state has fully complied with court orders and requests and it must determine whether a state or individual may be excused from complying with an order or request.

15. The court should be financed by the regular UN budget, supplemented, under appropriate safeguards for its independence, by the peace-keeping budget and by a voluntary trust fund. The experience of the two ad hoc Yugoslavia and Rwanda Tribunals demonstrates that an



international court must receive stable and adequate financial, human and technical resources to ensure its effective functioning. The independence of the court should not be affected by the method of its financing. Despite current difficulties, the best method over the long-term for providing regular and secure financing is through the regular UN budget, supplemented by the peace-keeping budget and a voluntary trust fund, provided that there are adequate safeguards for the court's independence. The court should not be financed by states parties or by complaining states, as this would discourage ratifications, cripple the court in its early years if a few wealthy states did not ratify the statute, be unreliable over the long-term and lead to domination by wealthy states.

16. There should be no reservations to the statute. The statute must expressly prohibit all reservations. Permitting reservations would defeat the object and purpose of the statute - to bring to justice those responsible for the worst crimes in the world - by allowing states parties to redefine crimes, to add defenses not consistent with international law or avoid obligations to cooperate with the court. It would also lead to an unworkable system in which each state would have undertaken a different set of obligations, instead of common international commitments.



ANNEX 18

News Articles on ICC Ratification

“Le Monde,” January 7, 1999, p. 6 (Paris)

Quoting Prime Minister Jospin:

“We are facing a new problem in the international stage. The United States often acts unilaterally, unequivocally assuming the role of leader of the international community (...) France must affirm itself on the international stage from the beginning. Not for the sake of power or in order to ‘teach a lesson’, but because [France] sees a certain number of international realities in a different manner.”

“[My administration] is contributing strongly to this affirmation of France’s positive image, for example, through the renovation of our aid policies towards African countries, the administration’s promotion of the International Criminal Court and the strong support of various international conventions in defense of human rights.”

“Taking into consideration the horrors of the genocide in Cambodia, it would be unacceptable that its authors escape punishment. In one way or another, they must pay for their crimes.”

“El Sol,” September 9, 1998 (Lima)

Call for an International Criminal Court

“Iberoamerican Ombudsmen’s Congress Concludes with Signing of Lima Declaration”

A permanent International Criminal Court, a fundamental step in the fight against impunity and the effective defense of human right in the world, was proposed at the conclusion of the Third Iberoamerican Ombudsmen’s Congress (FIO). The Lima Declaration, containing 18 points intended to strengthen the role of ombudsmen offices, was presented at the Congress.

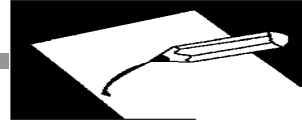
The Lima Declaration, signed by the 120 ombudsmen attending the event, pledges them to seek a more energetic fight for human rights in their respective countries.

The Lima Declaration proposes, among other recommendations, “a more efficient oversight of state institutions in order to instill good-government practices,” with the ombudsmen’s participation in the process of state reform.

The Declaration also includes a request that the United Nations High Commission for Human Rights take under consideration the Ombudsmen’s desire for their own, separate status in the deliberations of the Commission in Geneva.

“Financial Times,” July 31, 1998 (London)

Jesse Helms: We must slay this monster Voting against the International Criminal Court is not enough. The US should try to bring it down.



The decision by the US to walk away from the Rome treaty establishing a United Nations International Criminal Court was clearly the right thing to do. Since the signing ceremony in Rome, however, several governments have made clear their belief that the US will eventually succumb to international pressure and join the court, while others are hopeful that we will simply look the other way and not interfere with the efforts to establish and legitimize the court. The US can afford to do neither.

Rejecting the Rome treaty is not enough. The US must fight the treaty. Lloyd Axworthy, Canadian foreign minister, asked a good question in Rome: "The question is whether [the US] treats [the court] with benign neglect, or whether they are aggressively opposed." We must be aggressively opposed, because, even if the US never joins the court, the Rome treaty will have serious implications for US foreign policy.

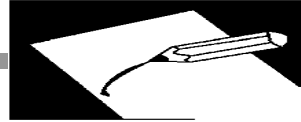
The Rome treaty is an irreparably flawed and dangerous document. It includes, as one of its "core crimes" something called "aggression" - a crime that was included even though the countries negotiating the treaty were unable to reach agreement on just what it is. It should be quite clear what will constitute "aggression" in the eyes of this court: it will be a crime of aggression whenever the US takes any military action to defend its national interests, unless the US first seeks and receives the permission of the UN.

This court proposes to sit in judgment on US national security policy. Imagine what would have happened if this court had been in place during the US invasion of Panama? Or the US invasion of Grenada? Or the US bombing of Tripoli? In none of those cases did the US seek permission from the UN to defend our interests. And so long as there is breath in me, the US will never - I repeat, never - allow its national security decisions to be judged by an International Criminal Court. Anyone who doubts the court will attempt to do so need only look to recent history. In the 1980s, the World Court attempted to declare that US support for the Nicaraguan contras was a violation of international law. The Reagan administration wisely ignored the World Court, because it lacked jurisdiction, and so had no authority in that matter.

Well, the International Criminal Court declares that the American people are under its jurisdiction - no matter what the US government says. The delegates in Rome included a form of "universal jurisdiction" in the court statute, which means that, even if the US never signs the treaty, or if the Senate refuses to ratify it, the countries participating in this court will still contend that American soldiers and citizens are within the jurisdiction of the court.

That is an outrage - and will have grave consequences for our relations with every country that signs and ratifies this treaty. Consider: Germany was the intellectual author of this universal jurisdiction provision. The US has thousands of soldiers stationed in Germany. Will the German government now consider those forces under the jurisdiction of the International Criminal Court? I support keeping our forces in Germany - but not if Germany insists on exposing them to the jurisdiction of the ICC.

Indeed, the Clinton administration will now have to renegotiate the status of our forces agreements not only with Germany, but with every other signatory state where American soldiers are stationed. And we must make clear to these governments that their refusal to do so will force us to reconsider our ability to station forces on their territory, participate in peacekeeping operations and meet our Article Five commitments under the NATO charter.



This treaty also represents a massive dilution of the authority of the UN Security Council - and the US veto within the council. In the words of the Indian representative, the delegates in Rome decided that “any pre-eminent role of the Security Council [would] constitute a violation of sovereign equality . . . [because] the composition of the Security Council and the veto vested in five permanent members is an anomaly which cannot be reproduced and recognized by the International Criminal Court”.

Incredibly, during the negotiations, the US went along with this back- door effort to dilute the Security Council's powers, agreeing to a proposal by Singapore that turns the Security Council on its head. Under the treaty adopted in Rome, the US cannot veto a case going before the court. Rather, blocking a case will require the support of a majority of the council, as well as consensus among all the permanent members. Such a dilution of veto power in the Security Council is unacceptable, and must be fought by the US.

Because this court has such wide-ranging implications for the US, even if we are never a party to the treaty, I intend to seek assurances from the Clinton administration that:

- The US will never vote in the Security Council to refer a case to the court.
- The US will provide no assistance whatsoever to the court, either in funding, in-kind contributions, or other legal assistance.
- The US will not extradite any individual to the court or, directly or indirectly, refer a case to the court.
- The US will include in all of its bilateral extradition treaties a provision prohibiting a treaty partner from extraditing US citizens to this court.
- The US will renegotiate every one of its status-of-forces agreements to include a provision that prohibits a treaty partner from extraditing US soldiers to this court, and not station forces in any country that refuses to accept such a prohibition.
- The US will not permit a US soldier to participate in any NATO, UN or other international peacekeeping mission, until it has reached agreement with all NATO allies and the UN that no US soldier will be subject to the jurisdiction of this court.

The International Criminal Court is a threat to US national interests. We cannot treat it with the “benign neglect” Mr. Axworthy is hoping for. As a Dutch delegate put it at the conclusion: “I won’t say we gave birth to a monster, but the baby has some defects.” He is wrong. The ICC is indeed a monster - and it is our responsibility to slay it before it grows to devour us.

Message of Pope John Paul II for the Celebration of the World Day of Peace, January 1, 1999

Source: Official Vatican Website

http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_14121998_xxxii-world-day-for-peace_en.html

RESPECT FOR HUMAN RIGHTS: THE SECRET OF TRUE PEACE

In my first Encyclical *Redemptor Hominis*, addressed almost twenty years ago to all men and women of good will, I stressed the importance of respect for human rights. Peace flourishes when these rights are fully respected, but when they are violated what comes is war, which causes other still graver violations.(1)



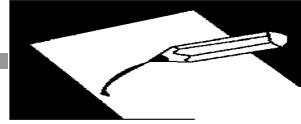
At the beginning of a new year, the last before the Great Jubilee, I would like to dwell once more on this crucially important theme with all of you, the men and women of every part of the world, with you, the political leaders and religious guides of peoples, with you, who love peace and wish to consolidate it in the world.

Looking towards the World Day of Peace, let me state the conviction which I very much want to share with you: when the promotion of the dignity of the person is the guiding principle, and when the search for the common good is the overriding commitment, then solid and lasting foundations for building peace are laid. But when human rights are ignored or scorned, and when the pursuit of individual interests unjustly prevails over the common good, then the seeds of instability, rebellion and violence are inevitably sown...

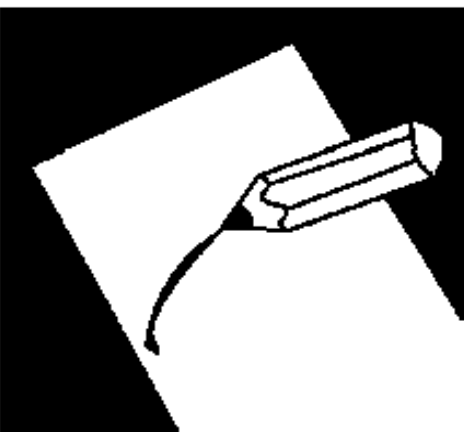
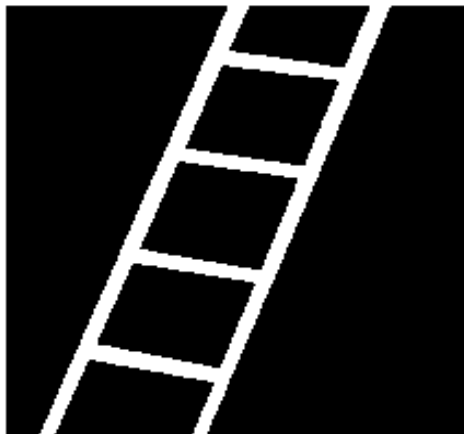
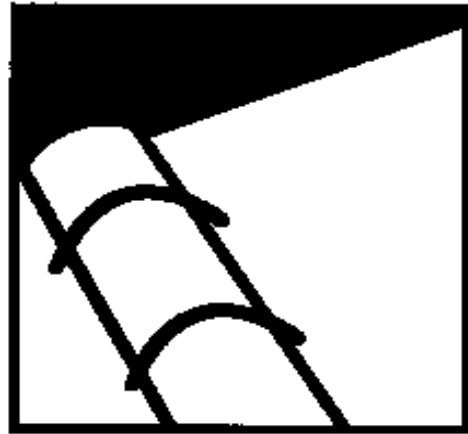
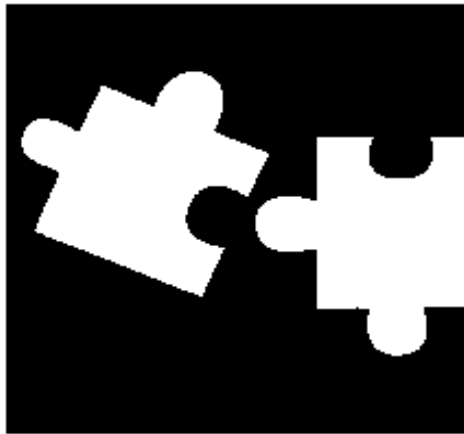
One of the most tragic forms of discrimination is the denial to ethnic groups and national minorities of the fundamental right to exist as such. This is done by suppressing them or brutally forcing them to move, or by attempting to weaken their ethnic identity to such an extent that they are no longer distinguishable. Can we remain silent in the face of such grave crimes against humanity? No effort must be judged too great when it is a question of putting an end to such abuses, which are violations of human dignity.

A positive sign of the growing willingness of States to recognize their responsibility to protect victims of such crimes and to commit themselves to preventing them is the recent initiative of a United Nations Diplomatic Conference: it specifically approved the Statute of an International Criminal Court, the task of which it will be to identify guilt and to punish those responsible for crimes of genocide, crimes against humanity and crimes of war and aggression. This new institution, if built upon a sound legal foundation, could gradually contribute to ensuring on a world scale the effective protection of human rights.

[The Pope goes on to enumerate 13 points: Respect for Human Dignity, the Heritage of Humanity; The Universality and Indivisibility of Human Rights; The Right to Life; Religious Freedom, the Heart of Human Rights; The Right to Participate; A Particularly Serious Form of Discrimination (Ethnic Discrimination); The Right to Self-Fulfillment; Global Progress in Solidarity; Responsibility for the Environment; The Right to Peace; A Culture of Human Rights, the Responsibility of All; A Time of Decision, a Time of Hope.]



SUPPLEMENTARY READINGS







SUPPLEMENTARY READING 1

What is International Humanitarian Law?

International Committee of the Red Cross

International humanitarian law is a set of rules which, for humanitarian reasons, seeks to limit the effects of armed conflict. It protects those who are not, or are no longer, taking part in fighting and restricts the means and methods of warfare. International humanitarian law ("IHL" for short) is also called the "Law of War" and the "Law of Armed Conflict".

Where does international humanitarian law come from?

International humanitarian law is part of international law. This governs relations between States. International law is found in agreements concluded between States - often called treaties or conventions - and in general principles and practices which States accept as legal obligations.

The origins of international humanitarian law can be found in the codes and rules of religions and cultures around the world. The modern development of the law began in the 19th century. Since then, States have agreed to a series of practical rules, based on the bitter experience of modern warfare, which represent a careful balance between humanitarian concerns and States' military requirements. As the international community has grown so has the number of States around the world who have contributed to the development of international humanitarian law. Today it may be regarded as a truly universal system of law.

Where can you find international humanitarian law?

A major part of international humanitarian law is found in the four Geneva Conventions of 1949. Nearly every State in the world has agreed to be bound by the Conventions. The Conventions have been developed and supplemented by two further agreements - the Additional Protocols of 1977.

There are also several agreements prohibiting the use of certain weapons and military tactics. These include the Hague Conventions of 1907, the 1972 Biological Weapons Convention, the 1980 Conventional Weapons Convention and the 1993 Chemical Weapons Convention. The 1954 Hague Convention protects cultural property during armed conflict. Many rules of international humanitarian law are now accepted as customary law - that is, as general rules which apply to all States.

What does international humanitarian law cover?

International humanitarian Law covers two areas:

- (1) The protection of those who are not, or are no longer, taking part in fighting.



(2) Restrictions on the means of warfare, notably weapons, and the methods of warfare, such as military tactics.

What is protection?

International humanitarian law protects those who do not take part in the fighting such as civilians and medical and religious personnel. It also protects those who no longer take part in the fighting such as those who have been wounded or shipwrecked, who are sick, or who have been taken prisoner.

Protected people must not be attacked. They must be spared from physical abuse and degrading treatment. The wounded and sick must be collected and cared for. Detailed rules, including the provision of adequate food and shelter and legal guarantees, apply to those who have been taken prisoner or detained.

Certain places and objects, such as hospitals and ambulances, are also protected and must not be attacked. International humanitarian law sets out a number of clearly recognisable emblems and signals which can be used to identify protected people and places. These include the red cross and red crescent.

What are the restrictions on weapons and tactics?

International humanitarian law prohibits all means and methods of warfare which:

- (a) fail to discriminate between those taking part in the fighting and those, such as civilians, who are not taking part in the fighting;
- (b) cause superfluous injury or unnecessary suffering;
- (c) cause severe or long-term damage to the environment.

International humanitarian law has thus banned the use of many weapons including exploding bullets, chemical and biological weapons and laser-blinding weapons.

When does international humanitarian law apply?

International humanitarian law only applies to armed conflicts. It does not cover internal disturbances such as isolated acts of violence. Nor does it regulate whether a State may actually use force: this is governed by an important, but distinct, part of international law contained in the United Nations Charter. International humanitarian law only applies once a conflict has begun and applies equally to all sides regardless of who began the fighting.

International humanitarian law distinguishes between international armed conflict and internal armed conflict. International armed conflicts are those in which at least two States are involved. They are subject to an extensive range of rules including those contained in the four Geneva Conventions and the first Additional Protocol. A more limited range of rules apply to internal armed conflicts - notably those set out in Article 3 of each of the four Geneva Conventions and in the second Additional Protocol. However in an internal armed conflict, just as in an international armed conflict, all sides must comply with international humanitarian law.

It is important to differentiate between international humanitarian law and human rights law. While some of their rules are similar, these two bodies of law have developed separately and are contained in different treaties. In particular, human rights law, unlike international humanitarian



law, applies in peacetime and many of its provisions may be suspended during in an armed conflict.



Does international humanitarian law actually work?

Tragically there are countless examples of violations of international humanitarian law in conflicts around the world. Ever-increasingly the victims of warfare are civilians. However, there are important cases where international humanitarian law has made a difference in protecting civilians, prisoners, the sick and wounded and in restricting the use of barbaric weapons. Given that it applies during times of extreme trauma, the application of international humanitarian law will always pose severe difficulties: its effective application remains as urgent as ever.

A number of measures have been drawn up to promote respect for international humanitarian law. States are obliged to educate their armed forces, and the general public, about the rules of international humanitarian law. They must prevent and, where necessary, punish all violations of international humanitarian law. In particular they must enact laws to punish the most serious violations of the Geneva Conventions and Additional Protocols which are regarded as war crimes. Measures have also been taken at the international level. Tribunals have been created to punish acts committed in two recent conflicts and consideration is now being given to a permanent international court which will be able to punish war crimes.

Whether through Governments and organizations or as individuals, we can all make an important contribution to the application of international humanitarian law.



SUPPLEMENTARY READING 2

Implementing International Humanitarian Law: from Law to Action

International Committee of the Red Cross

International humanitarian law, also called the law of war, sets out detailed rules which seek to limit the effect of armed conflict. In particular, it protects those who are not, or are no longer, taking part in the fighting, and sets limits on the means and methods of warfare. Humanitarian law is a universal set of rules. Its principal instruments have been accepted by nearly every State in the world. However adhering to these instruments is only a first step. Efforts must be made to implement humanitarian law - to turn the rules into action.

What is implementation?

Implementation covers all those measures which must be taken to ensure that the rules of international humanitarian law are fully respected. However, it is not only necessary to apply these rules once fighting has begun. There are also measures which must be taken outside areas of conflict and in time of peace as much as in time of war. These measures are necessary to ensure that:

- . all people, both civilian and military, are familiar with the rules of international humanitarian law;
- . that the structures, administrative arrangements and personnel required for the application of humanitarian law are in place;
- . that violations of humanitarian law are prevented and, where necessary, punished.

Such measures are essential to ensure the effective application of international humanitarian law.

Who should implement?

All States have a clear obligation to adopt and apply measures implementing humanitarian law. These measures may need to be taken by one or more government ministries, the legislature, the courts, the armed forces, or other State organs. A role may also be played by professional and educational bodies, voluntary organizations and the National Red Cross or Red Crescent Society.

Measures have also been taken at the international level to deal with violations of humanitarian law. An International Fact-Finding Commission has been established, and States are encouraged to use its services. Tribunals have been set up to deal with violations in Rwanda and the former Yugoslavia and the establishment of a permanent international criminal court is under discussion. However, it is States which continue to have the primary responsibility to ensure the effective implementation of international humanitarian law, and which must first and foremost adopt measures at the national level.

What needs to be done?

International humanitarian law - in particular the 1949 Geneva Conventions their Additional Protocols of 1977 and the 1954 Hague Convention on Cultural Property - sets out a range of measures which must be adopted. The principal measures are:



- (1) to prepare national translations of the Conventions and Protocols;
- (2) to disseminate the texts of the Conventions and Protocols as widely as possible - both within the armed forces and generally;
- (3) to suppress all violations of the Conventions and Protocols and in particular to adopt criminal legislation punishing war crimes;
- (4) to ensure that persons and places protected by the Conventions and Protocols are properly identified, located and protected;
- (5) to adopt measures to prevent the misuse of the red cross, the red crescent and other signs and emblems provided for on the Conventions and Protocols;
- (6) to ensure the protection of fundamental and procedural guarantees during time of armed conflict;
- (7) to provide for the appointment and training of persons qualified in international humanitarian law including legal advisers within the armed forces;
- (8) to provide for the establishment and/or regulation of:
 - . National Red Cross and Red Crescent Societies and other voluntary aid societies,
 - . civil defence organizations,
 - . national Information Bureaux;
- (9) to take account of international humanitarian law in the location of military sites, and in The development and adoption of weapons and military tactics;
- (10) to provide, as necessary, for the establishment of hospital zones, neutralized zones, security zones and demilitarized zones. The provisions of the Conventions and Protocols covering these measures are set out in the table below.

Some of these measures will require the adoption of legislation or regulations. Others will require the development of educational programmes, the recruitment and/or training of personnel, the preparation of identity cards and other materials, the establishment of special structures or units, and the introduction of planning and administrative procedures. All the measures are essential to ensure the effective implementation of humanitarian law.

How can these measures be achieved?

Careful planning and regular consultation is the key to ensuring effective implementation. Many States have established national international humanitarian law committees, or similar bodies, which bring together government ministries, national organizations, professional bodies and others with responsibilities or expertise in the field of implementation. Such bodies have generally been found to be an efficient and valuable means of promoting national implementation. In some countries, the National Red Cross and Red Crescent Societies may also be able to offer assistance in the field of implementation.

The International Committee of the Red Cross, through its Advisory Service on International Humanitarian Law, is available to provide advice and documentation to governments on national implementation: it can be contacted through the nearest ICRC delegation or at the address given below.



SUPPLEMENTARY READING 3

Protocols Additional to the Geneva Conventions of 1949 for the Protection of War Victims

International Committee of the Red Cross

International humanitarian law protects the victims of armed conflicts and limits the choice of methods and means of warfare. It applies in situations of international and non-international armed conflict.

The main instruments of international humanitarian law are the *Geneva Conventions of 12 August 1949 for the protection of war victims*. These treaties, which are universally accepted, protect the wounded, the sick, prisoners of war and civilians in enemy hands. They also protect medical services, namely medical personnel, medical units and establishments, and medical means of transport.

Although the four Geneva Conventions of 1949 are very comprehensive, they do not cover the full range of human suffering caused by war. There are gaps in important areas, for instance in the provisions relating to the behaviour of combatants and the protection of civilians from the effects of the hostilities. To remedy these shortcomings, two Protocols were adopted in 1977. They supplement, but do not replace, the Geneva Conventions of 1949. They are the *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*; *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*.

Why was Protocol I applicable in situations of international armed conflict adopted?

Protocol I imposes constraints on the way in which military operations may be conducted. The obligations set forth in this instrument do not ask too much of those in charge of military operations, as they do not encroach upon the right of each State to defend itself by any legitimate means.

This treaty came into being because new methods of combat had been developed and the rules applicable to the conduct of hostilities had become outdated. Civilians are now entitled to protection from the effects of war.

What new elements does Protocol I contain?

Protocol I gives a reminder that the right of the parties to a conflict to choose *methods and means of warfare* is not unlimited and that it is prohibited to employ weapons, projectiles and any other device that may cause superfluous injury or unnecessary suffering.

Protocol I defines legitimate targets in case of military attack. Furthermore it



a) *prohibits*

- . indiscriminate attacks and attacks or reprisals against
- . the civilian population and individual civilians,
- . objects indispensable to the survival of the civilian population,
- . cultural objects and places of worship,
- . works and installations containing dangerous forces,
- . the natural environment;

b) *extends*

the protection accorded under the Geneva Conventions to all medical personnel, units and means of transport, both civilian and military;

c) *establishes*

an obligation to search for missing persons;

d) *reinforces*

the provisions concerning relief supplies for the civilian population;

e) *affords*

protection for the activities of civil defence organizations;

f) *specifies*

measures to be taken by States to facilitate the implementation of humanitarian law.

Violations of the prohibitions listed in sub-paragraph a) above are deemed to be grave breaches of humanitarian law and are classified as *war crimes*.

Article 90 of Protocol I provides for the establishment of an *International Fact-Finding Commission* to investigate all alleged grave breaches or other serious violations of the Conventions and of Protocol I. All States Parties may accept the competence of the Commission, which has meanwhile been set up.

Why was Protocol II applicable to non-international armed conflicts adopted?

Most conflicts since the Second World War have been non-international. The only provision in the Geneva Conventions of 1949 applicable in this type of conflict is *Article 3 common* to all four Conventions which, although very detailed, is insufficient to resolve the serious humanitarian problems caused by internal conflicts.

The humane principles already introduced by common Article 3 into non-international conflicts are



reinforced by Protocol II. In so doing, it in no way restricts the right of States or the means available to them to maintain or restore law and order on their national territory. Compliance with the provisions of Protocol II therefore does not imply recognition of any status for dissident armed forces.

What new elements does Protocol II contain?

Protocol II applies only to internal armed conflicts of a certain intensity in which dissident armed forces, under responsible command, exercise control over a part of the national territory.

Protocol II

a) *sets forth*

the fundamental guarantees to which all persons not, or no longer, taking part in hostilities are entitled;

b) *establishes*

the rights of persons whose liberty has been restricted, and the judicial guarantees of a fair trial;

c) *accords*

protection to the civilian population and to civilian objects;

d) *prohibits*

intentional starvation and forced displacement.

Protocol II also stipulates that the wounded must be protected and cared for, and that medical personnel and transports must be protected and respected. The red cross and red crescent emblem must likewise be respected, and its use must be restricted to those persons duly authorized to display it.

Additional Protocols I and II of 1977 are binding on a large number of States, but it is essential that they attain universal recognition, for only when all States have pledged compliance with their humanitarian rules, and are clearly aware of their mutual commitments, will it be possible to ensure equal protection for all the victims of all armed conflicts.



SUPPLEMENTARY READING 4

GENDER AND NON-COMBATANT IMMUNITY

*Judith Gardam**

I. INTRODUCTION

Armed conflict has devastating consequences for women.¹ The Persian Gulf conflict² and the ongoing situation in the former Yugoslavia are recent and horrific examples.³ A common perception, however, is that suffering involving civilian casualties, [End of Page 346] rape, and sexual assaults is inevitable. Yet international lawyers would argue that the legal regulation of armed conflict is highly developed.⁴ Moreover, they would maintain that the rules operate on a neutral and objective basis--the level of the conflict⁵--and protect both combatants and non-combatants. On one level this argument is correct: there are such rules. But the rules with respect to non-combatants, especially when they are women, are relatively ineffective. How can this be explained? Perhaps it is inherently easier to regulate aspects of warfare that relate to combatants such as prescribing what type of weapons are legitimate and the treatment of combatants hors de combat.⁶ Rape in warfare, however, should be [End of Page 347] equally easy to prohibit. The rationale often advanced to justify the failure of the law to effectively protect civilians is the demands of military necessity. This rationale is irrelevant in the context of outlawing rape in warfare.⁷ Moreover, do the demands of military necessity unquestionably justify large scale civilian losses to protect combatants as occurred in the Persian Gulf conflict?⁸

My argument here is that another factor is involved in the existing structure of the law of armed conflict, an assumption which values lives according to gender. Gender describes "a systematic social construction of masculinity and femininity that is little, if at all, constrained by biology."⁹ The social construction of gender is very marked in the law of armed conflict. This law contains a fundamental division in its rules based on gender, namely the distinction between combatants and non-combatants--the legal reflection of the dichotomy observed by other feminist writers in international relations between the protector and the protected.¹⁰ In relation to the activity which is regulated by the law of armed conflict (the use of force in the interests of national security) the social construct of what it is to be male in our society is represented by the male warrior, the defender of the security of the State. Those who do not take up arms are equated with the female. That this version of the male is gendered and not innate is pointed out by many writers. For example, in her analysis of the impact of gender on the discipline of international relations, Ann Tickner builds on R.W. Connell's notion of "hegemonic masculinity" as the dominant form of masculinity which, although not reflecting the reality for the majority of men, functions to sustain the patriarchal order.¹¹ This [End of Page 348] concept of masculinity is sustained by comparison with other devalued forms of masculinity¹² and femininity.¹³

Within such a structure, the role of the military is pivotal and, as we will see, the law reflects these values by privileging the life of the combatant. It does this through the doctrine of military necessity. Military necessity is part of the broader framework of the relationship between militarism, sexism, and patriarchy, and most significantly in this context, the demands of national security.¹⁴ National security--the defense of the State--determines to a large extent the content of the rules of armed conflict and what limitations States are prepared to tolerate on their freedom of



action during war. Military necessity is used to achieve the preeminence of national security over other factors. Its demands ensure that restrictions on the conduct of warfare are limited by what is seen as necessary for the defense of the State. Military necessity is taken as a given; [End of Page 349] military lawyers use it without further explanation to justify the impracticality of efforts to improve the protection of combatants. However, it is not a neutral yardstick; it incorporates a hierarchy of values. Military necessity assumes that the military victory of the State is pre-eminent. >From this assumption flows the seemingly logical value judgment that the life of the combatant is more important than the civilian, even more so if that civilian belongs to the "enemy" State. Thus, one of the major factors in the assessment of military necessity is the question of combatant casualties. The military strongly resists the notion that combatants should assume risks to protect the civilian population.

The influence of military necessity is strongest in relation to the regulation of the means and methods of warfare, such as the rules regulating indiscriminate bombardment and weapons limitations. The regulation of events occurring after the conflict, such as during occupation or when participants are hors de combat and no longer a threat to the other party, rarely involve questions of military necessity. Nevertheless, even in these latter areas the law is proportionally far more highly developed in relation to combatants.¹⁵ The major threat to civilians, however, is derived from the conduct of warfare itself, a point well illustrated by the campaign of aerial bombardment adopted by the coalition forces in the Persian Gulf conflict. The regulation of warfare itself acutely raises considerations of military necessity and attempts to improve the protection of civilians in such circumstances have always faced the difficult task of reconciling such protections with the demands of the military.

This paper argues that the impact of gender on the system of rules relating to non-combatants is twofold. First, the distinction in the law of armed conflict between combatants and non-combatants itself is gendered; that is, lives are privileged by the existing rules according to gender. Thus, the paper considers the unequal protections offered by the legal regime to non-combatants. Second, even within the system of rules protecting non-combatants there is a gender dimension in the lack of rules which provide equal protection to women. The failure of the law to regulate the widespread practice of rape of women in warfare until relatively recently is an illustration of this imbalance.

It is a particularly appropriate time to undertake a study of gender and non-combatant immunity as the barriers in many States to women's participation in the military are being lifted.¹⁶ As a [End of Page 350] result, an important question arises as to whether the participation of women in the military will change its ethos. More specifically for the law of armed conflict, will this participation improve the imbalance in the rules protecting combatants and non-combatants? The final section of the paper, therefore, examines prospects for change and the possibility of a redefinition of the law of armed conflict more consistent with feminist concerns.

II. THE PRIVILEGING OF THE COMBATANT BY THE LAW OF ARMED CONFLICT

The legal system for the regulation of armed hostilities between States has traditionally been comprised of two main branches.¹⁷ First, the *jus ad bellum*, which is concerned with the justness of the resort to force, and second, the *jus in bello*, the rules applicable in armed conflict. This paper is concerned with the latter. The sources of the law of armed conflict are both codified and customary.¹⁸ With the movement in the latter part of the last century and early in this century for the codification of the law of armed conflict, the *jus in bello* has been further divided into the Law of the Hague and the Law of Geneva.¹⁹ The Law of the Hague is the term often used to describe the law of warfare proper--the means and methods of warfare. The Law of Geneva refers to humanitarian law²⁰ whose purpose is to [End of Page 351] ensure respect for human life in armed



conflict as far as is compatible with military necessity and public order. The Law of Geneva imposes no restrictions on the means and methods of warfare but provides for such matters as the treatment of prisoners of war, civilians in occupied territories, and persons hors de combat.

There has been discussion among commentators as to whether the Law of Geneva and the Law of the Hague remain separate bodies of rules and concerning the true content and sources of humanitarian law.²¹ Protocol I to the four Geneva Conventions of 1949 (the most important source of the Law of Geneva) deals with both the means and methods of warfare and the principles of the Law of Geneva, contributing to the gradual decline in the demarcation between the two. Such discussions may seem somewhat academic. The distinction, however, is significant from a gender perspective. Whether or not a particular rule is part of the law of warfare or restricted to the traditional definition of humanitarian law assumes importance when it comes to discussing changes to the rules. States are less willing to countenance changes to "combat rules" to protect civilians, such as non-combatant immunity, than to rules which operate outside that area.²² This is illustrated by the comparative ease of the negotiation of the four Geneva Conventions of 1949 as contrasted with the difficulties experienced in the negotiation of Protocol I which interferes significantly with the means and methods of combat.²³ Moreover, the [End of Page 352] rules protecting civilians in Protocol I have attracted concerted opposition, particularly from the United States and its military establishment, and are one of the reasons underlying that State's decision not to ratify the Protocol.²⁴

A gender bias in the development and content of the rules of armed conflict is clear. The emphasis on the doctrine of military necessity and the perceived need to protect combatants have led to resistance from States and their military establishments to an improvement in the rules for the protection of civilians. This opposition has occurred against the background of increasing vulnerability of civilians in this century to the effects of armed conflict.²⁵ Despite the appalling loss of civilian life in World War II as a result of the aerial bombardment of civilian targets such as Dresden and Leipzig,²⁶ the only treaty rules for civilians to come out of this conflict were those contained in the Fourth Geneva Convention for the Protection of Civilian Persons. Despite its name, the Convention only protects a strictly defined category of civilians from arbitrary actions by the enemy, not against the dangers of military operations themselves. Any provision in the draft of the Convention designed to protect the civilian population from the dangers of military operations was carefully removed.²⁷ Aerial bombardment, the major cause of civilian casualties during armed conflict, remained unregulated.²⁸ Thus the rules for civilians did not interfere with the means and methods by which military men got on with the task of winning wars. On the other hand, the international community at the same time adopted three Conventions dealing with [End of Page 353] the protection of combatants.²⁹ The protections offered to these groups of persons by these conventional rules are extremely detailed. The standards that States must meet in relation to the treatment of prisoners of war, for example, are considerably higher than the new treaty rules in Protocol I in relation to civilians.

It was not until 1977 that the principle of non-combatant immunity, asserted to be a foundation of the law of armed conflict, was finally codified.³⁰ This could be regarded as a major achievement for civilians. The new rules implementing the general principle of non-combatant immunity are detailed and impose significant limitations on military options in order to protect civilians.³¹ What has been the response of States to these rules? The majority of States likely to be involved in armed struggles attracting its operation have not ratified the Protocol.³² The United States in particular has strongly opposed the acceptance of its provisions³³ [End of Page 354] and the practice of the coalition forces in the Persian Gulf conflict has seriously undermined the process of transformation into customary law of the provisions of the Protocol in relation to civilian protection. In particular, in the process of determining the balance between casualties and the achievement of military goals, the limited interpretation placed by the coalition forces on what



amounts to excessive casualties in light of the military advantage anticipated will impact negatively on the acceptance of a wider obligation by States.³⁴ Clearly in the assessment of this balance combatant lives were valued far more highly than civilian lives. The choice of a campaign of massive aerial bombardment in the Persian Gulf conflict instead of a ground assault also rests on assumptions that combatant lives are of more significance. It is instructive to contrast the combatant casualties of the coalition forces and the Iraqi civilian casualties against the background of the well established principle in international law that the legality of a party's resort to force is not permitted to affect the equal application of the rules.³⁵ With hindsight it becomes clear that although the legal rules have always prioritized the protection of combatants, this imbalance has been exacerbated by the advent of increasingly sophisticated methods of warfare, such as aerial bombardment. These methods inevitably involve women and the civilian population to a significant extent. Moreover, compliance with rules requiring the protection of civilians will often be perceived to be at the expense of military efficiency by increasing combatant casualties.

III. THE PROTECTION OF NON-COMBATANTS

I have argued that the developing rules of armed conflict have assumed the protection of the combatant as the first priority, with predictable consequences for non-combatants. It could, however, be maintained that the emphasis over the years on the development of the theory of non-combatant immunity demonstrates a concern for the treatment of women in war.³⁶ Although in practice non-combatant immunity is the rule most relevant to the protection of women, it would be a mistake to assume that the origins of the rule and its theoretical underpinnings are consistent with feminist concerns. Non-combatant immunity is a means of containing or limiting violence. Although it can be regarded as based on principles of humanity, in reality it serves the purposes of the patriarchal State by keeping the society stable and allowing the fighter to return to the hearth once the battle is finished. Its derivations are all gendered: from the chivalric tradition, based on the patronizing of women,³⁷ to the canonical doctrine which primarily protected the Church's own to the exclusion of women.³⁸

Non-combatant immunity has had a long and checkered history³⁹ evolving against the background of the development over many centuries of Christian theories of the just war.⁴⁰ The Christian [End of Page 356] just war theory is a complex interplay of various religious, moral, and purely secular factors and has received a great deal of attention from theologians, historians, and political writers over the centuries.⁴¹ None of these studies has focused on the treatment of women as non-combatants. Women are subsumed in the category of male civilians, despite the fact that they experience warfare in many ways differently from men.⁴² Moreover, the theological basis of non-combatant immunity is the so-called principle of double effect, a concept also relied on by some theologians in relation to abortion.⁴³ This rule is concerned with circumstances involving the indirect killing of the innocent. Under the principle of double effect the indirect evil effect of an act not wrongful in itself is accepted as legitimate as long as it is directed towards a "just" end. This interpretation has little or no meaning for many feminists who see no gains for women in such convoluted analyses.

The modern jurisprudential basis for the principle of non-combatant immunity developed from Rousseau's idea that war was a contest between States rather than individuals.⁴⁴ The idea of distinguishing between categories of persons and their treatment in warfare was not, however, a new development. During the era of the just war, Canon law, through such means as the Peace of God, developed categories of persons who were immune from the effects of warfare.⁴⁵ The distinction between combatants and non-combatants was drawn in the canonical doctrine on the basis of occupation. Clerics, monks and friars, for example, were "entitled to full security against the ravages of war."⁴⁶ The basis of this immunity [End of Page 357] was self-interest--the protection of the institution of Christianity.



The secular chivalric tradition similarly provided protection for other groups, including women.⁴⁷ Although the institution of chivalry led to restraints on the conduct of warfare and recognized the concept of non-combatancy, it was also based on self-interest--the preservation of the superior position of the knightly class. One commentator describes the "protector-protected" relationship between knights and the demeaned "other," women, that was used to perpetuate chivalric dominance.⁴⁸ Part of this relationship depended on the exclusion of women from combat because they did not have the physical strength to handle the weaponry of the time.⁴⁹ Thus, the distinction between non-combatants and combatants was drawn in chivalric tradition between the "enemy" and the "innocents"--the enemy were those who carried arms, the innocents did not. This differentiation conveniently created a class of inferior individuals requiring protection which ratified the superior position of men. Much of what was true in the chivalric era in relation to women and warfare continues today. The protector-protected distinction survives, with one of its foundations being the claim that women are, as in the chivalric period, unable physically to engage in combat roles.⁵⁰ Some feminists argue that this refusal to allow women to participate in combat deprives them of the possibility of full citizenship as it is perceived in our society and keeps them in a position of subordination.⁵¹

Generally the acknowledgement of women by the developing theories of non-combatant immunity was rare, but nowhere is women's marginalization more evident than in the attitude of the [End of Page 358] law of armed conflict to rape, an experience limited to women. Rape in warfare has been consistently unreported and unrecorded, although it has resulted in death and suffering to countless women over the years. It has been a horrific but tolerated practice.⁵² In medieval times, although in theory prohibited, rape was regarded as part of the spoils of war and was a major incentive for continued fighting, especially in siege situations.⁵³ Very little has changed over the years, although it appears that rape in the ongoing conflict in the former Yugoslavia has assumed the characteristic of a method of warfare with similar aims as the deliberate targeting of the civilian population--the destruction of the culture and morale of the civilian population. Although there were fleeting references to the practice of rape in warfare in the continuing process of developing and codifying the law of warfare, they were marginal and widely flouted.⁵⁴ It is difficult to find any support for the view that non-combatant immunity at any time in its development has included protection from rape. The early focus of the developing protections for non-combatants was on devising categories of persons who were protected from harm both during and after wars, with women of peripheral concern in this process. The modern form of the principle of non-combatant immunity in international law has a narrower focus and is confined to regulating the direct effects of warfare in relation to those persons who are regarded by the law as civilians and includes the important prohibitions on the direct targeting of [End of Page 359] civilians and indiscriminate attacks. It is part of the so-called Law of the Hague.

The treatment of non-combatants after the conflict is now dealt with by the so-called Law of Geneva. To what extent is rape regulated within these rules? It was not until 1949 that the first attempts to specifically outlaw rape were made.⁵⁵ Article 27(2) of the Fourth Geneva Convention of 1949 requires that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."⁵⁶ Although clearly a long overdue development, the designation of rape as an attack on women's honor has far more to do with how men perceive rape than how women do themselves. Women experience rape as torture and it should be recognized as such by the legal regime.

The scope of the Fourth Convention is limited. It is designed to protect persons in occupied territories from arbitrary actions by the enemy. Certainly the Convention would apply in many situations where rape occurs in warfare, but by no means all. The definition of "protected persons" in Article 4 does not cover a party's own nationals or nationals of a neutral State and co-belligerent State who are in the territory of a belligerent State.⁵⁷ A comprehensive treaty [End of



Page 360] prohibition of rape in respect of all situations of armed conflict was not in place until 1977. Rape is dealt with specifically in Article 76 of Protocol I, which states that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution, and any other form of indecent assault."⁵⁸ This Article expands the protections offered by the Fourth Convention to all women affected by the armed conflict.⁵⁹ It is hard to argue in light of the constant contrary State practice that these provisions represent customary law.

Although rape is regarded by women as one of the worst practices of armed conflict, the law does not share this perception. Neither of the provisions referred to above are regarded as imposing obligations whose breach constitutes a grave breach of the law of armed conflict. Grave breaches in the law of armed conflict refer to infractions of the rules which impose obligations on contracting parties to enact legislation to repress such breaches. There is jurisdiction conferred on all State parties to seek out and prosecute persons who commit such offenses.⁶⁰ To the extent that the conventional provisions defining grave breaches are reflected in custom they also confer universal jurisdiction on all States. Although rape is not specifically designated as a grave breach, it is arguably covered by the phrases "torture or inhumane treatment" or "wilfully causing great suffering or serious injury to body and health," which are designated as grave breaches in all four Geneva Conventions.⁶¹ Pictet argues that what constitutes humane treatment follows logically from the general principle that all protected persons are entitled to respect for their persons, their honor, etc.⁶² Rape, in Article 27 of the Fourth Convention, is treated as an attack on women's honor and arguably all attacks on a person's honor constitute inhumane treatment. Undue reliance, [End of Page 361] however, should not be placed on this explanation. The fact that rape is specifically referred to in Article 27 but not in the articles in the Conventions defining grave breaches militates against a broad interpretation.⁶³ Moreover, it appears that the phrase "inhumane treatment" was included to cover possibilities that had not been seen by the drafters of the Convention.⁶⁴ If this interpretation is warranted it is very difficult to maintain that rape is covered by this phrase as it was already a well established practice in warfare.

The phrase "wilfully causing great suffering or serious injury to body and health" can readily be construed to cover rape. Recently the International Committee of the Red Cross has declared that the phrase "obviously covers not only rape but also any other attack on a woman's dignity."⁶⁵ Nevertheless, it would have been preferable if rape of women had been designated as a grave breach rather than leaving it as a question of interpretation.

In the context of non-international armed conflicts, a distinction itself inconsistent with feminist concerns,⁶⁶ rape has been specifically outlawed in two provisions of Protocol II: Article 4(2)(e) and Article 6. Protocol II has a very high level of application and would not apply in the majority of civil conflicts taking place in the world today.⁶⁷ Therefore, the so-called "convention in miniature" in common Article 3 to the Geneva Conventions would frequently be the only relevant law applicable in many civil conflicts. There is no specific mention of rape in common Article 3.

There are signs of change in light of the international community's attitude toward the treatment of women in the former [End of Page 362] Yugoslavia.⁶⁸ International scholars are also beginning to address such issues.⁶⁹ Theodor Meron has argued persuasively that rape could constitute a crime against humanity.⁷⁰ This is also the approach in the proposed statute of the international tribunal for the prosecution of breaches of humanitarian law in the former Yugoslavia.⁷¹ Although a positive recognition of the suffering of the women concerned, this approach obscures the fact that non-systematic and non-mass rapes should also be treated as grave breaches and prosecuted by the law of armed conflict.⁷² For example, the international community does not wait until there is mass or systematic mistreatment of prisoners of war before action is taken. Why a different standard for offenses only involving women? A different approach could be to put rape in warfare into terms that military men may understand better. Arguably rape in the former



Yugoslavia is not merely a random and primarily individual act, but a method of warfare designed to contribute to the ethnic cleansing of Bosnia-Herzegovina.⁷³ Indeed, feminists have argued that in one [End of Page 363] sense rape is never truly individual, but an integral part of the system ensuring the maintenance of the subordination of women.⁷⁴ The difference for the law of armed conflict is, however, significant. If rape is treated as a method of warfare it must be measured against existing legal standards to determine its legitimacy, just as actions against combatants are. Over the years, one of the major aims of the rules protecting combatants has been to regulate the use of weapons causing unnecessary suffering. This practice commenced during the Middle Ages with the restriction on the use of certain weapons for reasons of proportionality and humanity.⁷⁵ This practice has continued into modern times with proportionality remaining the basis of the prohibitions and becoming a fundamental principle of the law of armed conflict which requires that no more force be used than is necessary to subdue the enemy.⁷⁶ This doctrine itself is derived from two cardinal principles of the modern law of armed conflict: that belligerents do not have unlimited choice in the means chosen to inflict damage on the enemy, including both [End of Page 364] combatants and non-combatants; and "that the only legitimate object which States should endeavour to accomplish is to weaken the military forces of the enemy." The question arises as to why the use of rape was never regarded as a means and method of warfare causing unnecessary suffering and prohibited. On any analysis it infringes the requirement that only actions that weaken the military forces of the enemy are legitimate. Rape has traditionally not been regarded as a means and method of warfare but as a regrettable, albeit inevitable aspect of armed conflict. Could this be a reflection of the fact that rape only happens to women? It is inconceivable that a comparable humiliating and degrading practice in relation to combatants would ever be tolerated by States. One is left with the conclusion that there was no need to regulate rape as it did not affect combatants. Moreover, rape did not impact negatively on military efficiency, perhaps quite the reverse.⁷⁷

IV. THE GENDERED DISTINCTION--A NEW FORMULATION

This paper has considered two aspects of the gender imbalance existing in the structure and rules of the law of armed conflict. One derives from the distinction between combatants and non-combatants itself and the privileging of the combatant by the system. The other concerns how the content of the rules protecting non-combatants privileges male concerns. So far the only progress that has been made in remedying the imbalance in both these contexts has been by widening the definition of what constitutes an indiscriminate attack and increasing the number of targets against which attacks may not be directed. It is not suggested that these efforts are misguided or a waste of time. They are, in fact, the main focus of the efforts of the International Committee of the Red Cross and significant progress has been made in improving the protections offered to civilians. However, no matter how effective the rules are in theory, their practical implementation is affected by gender considerations.

One example will suffice. The international community, in the face of considerable opposition, succeeded in codifying in Protocol I the principle of proportionality in relation to civilian losses. Article 51, paragraph 5(b) of the Protocol defines as indiscriminate attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁷⁸ It appears from the use of [End of Page 365] the words "direct and concrete" that the Protocol requires that military advantage be assessed in relation to each individual attack rather than on a cumulative basis. Certainly the former is more conducive to the increased protection of civilians. The United States, although not a party to the Protocol, accepts proportionality as a customary rule.⁷⁹ Nevertheless, the interpretation of the principle of proportionality adopted by the Coalition forces in the Persian Gulf conflict led to large scale civilian casualties due to an assessment of the military advantage on a cumulative basis rather



than on a case by case basis as required by the Protocol.⁸⁰ The attacks on such targets as water treatment plants and power plants were assessed in terms of their contribution to the weakening of the overall military forces of Iraq, rather than by balancing the long and short term civilian casualties against a direct, immediate military advantage. Such an analysis places considerable weight on military necessity and the protection of a States' own combatants, while placing considerably less emphasis on civilians than the international community had in mind when they negotiated Protocol I.

The gendered nature of the distinction between non-combatants and combatants is immune to an "equality" approach. Formal equality requires identical treatment for women and men. That is, in this context, the same legal rules apply to male and female combatants and civilians respectively. With some minor exceptions, for example in relation to the treatment of women prisoners of war, this is in fact the case. Such an analysis fails to address the underlying assumptions of the legal regime that mandate the preferred position of the combatant. Unless the concept of military necessity and the perceived demands of national security are reevaluated, nothing will change. Herein lies the explanation of why, despite considerable efforts by many sections of the international community, the position of civilians in warfare continues to be catastrophic. How is change to be achieved? Obviously a starting point is the military itself. Arguments based on equality have allowed the increased participation of women in the male-gendered role of combatant.⁸¹ The important issue for feminists is whether women will make any impact on the military: will it be that only [End of Page 366] those able to demonstrate their ability to mold themselves to the existing gender structure will attain positions of influence?⁸² It is not so much whether women should or should not serve in the military, but whether they will be forced to adopt the male gender role. If this is the case, non-combatants will continue disproportionately to bear the burden of suffering in armed conflict. One writer has commented that the experience of women in the military shares much that is positive in common with men.⁸³ Such a conclusion demonstrates the deficiencies of equality analysis as a feminist strategy: that merely increasing the participation of women in the military changes nothing. The experience of women in the military indicates that, although the military and its institutions both need and use women, it can still remain impervious to fundamental change. This reinforces the feminist argument of the power of the gender construct of masculinity in the military and in society generally, to absorb, appropriate, and transform all irrespective of sex into the gender male.

More fundamental change is required relating to the nature of the military. Some feminists, accepting women's inherent "difference" from men, would see the comprehensive participation of women in the military as having the potential to make a difference to its culture. This approach is predicated on the acceptance of the caring or nurturing role of women, the so-called "ethic of care," which some feminists see as inherent in womanhood.⁸⁴ The theory to a large extent fails to acknowledge women's traditional role as part of the gendered construct of femininity.⁸⁵ This assumption about the true nature of women would regard militarism and warlike activity as the antithesis of this role. There are serious theoretical and political shortcomings in a simplistic theory that women given the choice would turn their backs on military activity [End of Page 367] and everything it represents.

Similar issues arise in the context of the contribution women have made to peace and their involvement in peace movements.⁸⁶ Underlying some of this work is the assumption that the inclusion of women's voices in these areas would lead to greater emphasis on the peaceful settlement of disputes.⁸⁷ Catharine Mackinnon's view that the "other" voice identified by "ethic of care" feminists is the voice of the oppressed sounds a warning to those who would so limit the potential of women's contributions.⁸⁸ Irrespective of the likelihood of change in the future, however, the feminist project in the law of armed conflict is just beginning and it must still confront



the quintessential male as represented by the combatant with all its attendant power and mystique.

One interesting development in the international community may have the potential to change the image of the male warrior and possibly have an effect on the law of armed conflict.⁸⁹ This is the recent practice of the military forces of many States functioning as peacekeepers under the auspices of the Security Council.⁹⁰ Feminist writers have shown how the military relies on the constructed nature of masculinity to train men to kill in combat. This construct [End of Page 368] relies on violence, male bonding, and aggression.⁹¹ It is conceivable that the training of soldiers may have to change if one of their roles is an increased participation in peacekeeping, an activity that has none of the associations of patriotism and protecting the State that have led to such excesses in the past.⁹² The rules of engagement for peace keeping operations for Australian troops, for example, place the emphasis on firing as a last resort. Although the legitimate resort to force under the U.N. system is restricted to the use of force in self- defense under Article 51 and collective security action under Chapter VII of the U.N. Charter,⁹³ this change in the justification for the use of force has not significantly altered the attitude of States that wars are about winning and losing. Thus the training of the military continues to focus on the defeat of an enemy and the victory of the State continues to be of supreme importance.⁹⁴ None of these [End of Page 369] factors are present in peacekeeping operations. The evidence is clear, however, that any significant change is a long way in the future. Peacekeeping forces overall are behaving just as the military has always done.⁹⁵

V. CONCLUSION

This paper has argued that the gender of non-combatant immunity has led to the marginalization of women by the law of armed conflict. This area of the law purports to be based on the principle of humanity. It needs to be acknowledged that humanity is not a gender-neutral concept but focuses on the experiences of the male gender and particularly, in this context, the male warrior. Clearly the legal regime reflects assumptions about the demands of national security and military necessity that must change before the law will follow suit. It is too early to determine whether the signs of change in the international community's attitude to rape in the former Yugoslavia are just a passing phenomenon. It is difficult to be too optimistic. As a result of the massive campaign of aerial bombardment in the Persian Gulf conflict thousands of women in Iraq are still experiencing the grim reality of the protection by the law of the male warrior irrespective of the cost in women's lives.

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¹ See, e.g., Christine M. Chinkin, *A Gendered Perspective to the International Use of Force*, 12 AUSTL. Y.B. INT'L L. 279 (1992); Christine M. Chinkin, *Peace and Force in International Law*, Paper presented to the American Society of International Law (Apr. 1993) (on file with author) [hereinafter *Peace and Force*] For a graphic account of rape in warfare over the centuries see SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 3-113 (1975). See also Geoffrey Best, *Restraints on War by Land before 1945*, in *RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT* 17, 26 (Michael Howard ed., 1979); MICHAEL WALZER, *JUST AND UNJUST WARS* 133-34 (2d ed. 1992); Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 26, 29-31 (1992).

² See *Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq*, U.N. Doc. S/22366 (1991); AMNESTY INT'L, *REPORT ON THE GULF WAR* (1991); MIDDLE EAST WATCH, *NEEDLESS DEATHS IN THE GULF WAR* (1991); HARVARD STUDY TEAM REPORT, *PUBLIC HEALTH IN IRAQ AFTER THE GULF WAR* (May 1991); HARVARD STUDY TEAM REPORT, *HEALTH AND WELFARE IN IRAQ AFTER THE GULF CRISIS* (Oct. 1991); *Gulf War Casualties*, NEW INT'L, Oct. 1991, at 30.



³ See, e.g., HUMAN RIGHTS WATCH, *WAR CRIMES IN BOSNIA-HERCEGOVINA* (1992). The rape of women in the former Yugoslavia has received unprecedented attention in the international community. For the first time States are considering taking steps to bring to justice those responsible for these breaches of the law of armed conflict. Security Council Resolution 771 called upon States to supply to the Council "substantiated information ... relating to the violations of humanitarian law ... being committed in the territory of the former Yugoslavia." S.C.Res. 771, U.N. SCOR, 47th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/771 (1992). Several States and organizations responded to this request. See *European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to EC Foreign Ministers*, Annex 1, U.N.Doc. S/25240 (1993). In pursuance of Security Council Resolution 780 a Commission of Experts was established by the Secretary-General to investigate establishing an international tribunal to prosecute "persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia." The Commission submitted its interim report to the Council. See *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, ¶¶ 55-60, U.N. Doc. S/25274 (1992) (considering the practice of ethnic cleansing and rape and sexual assault). Security Council Resolution 808 requested the Secretary-General to report within sixty days on proposals for the establishment of an international tribunal for the prosecution of persons responsible for serious violations of humanitarian law. S.C.Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993). The subsequent *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (1993), including the proposed statute for the tribunal, was approved by Security Council Resolution 827. S.C.Res. 827, U.N.Doc. S/RES/827 (1993).

⁴ The law of armed conflict is one of the most highly codified areas of international law although the customary sources remain of considerable significance in some areas. This process of codification commenced in the middle of the nineteenth century. The most recent developments include the Protocol Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I] and the Protocol Relating to the Protection of Victims of Non- International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 606, 16 I.L.M. 1442 [hereinafter Protocol II] As of December 31, 1992, 119 States had ratified or acceded to Protocol I and 109 States had ratified or acceded to Protocol II. The provisions of the Protocols to some extent represent a development rather than a codification of the existing law, an issue of considerable controversy in relation to Protocol I. See, e.g., THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989). For comprehensive coverage of the relevant conventional rules, see *DOCUMENTS ON THE LAWS OF WAR* (Adam Roberts & Richard Guelf eds., 2d ed. 1989).

⁵ The application of the rules vary. For example, the Geneva Conventions of 1949, by common Article 2, extend the coverage of the Conventions in cases of international conflicts "to all cases of declared war or of any other armed conflict ... even if the state of war is not recognized by one of them." Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287. Protocol I adopts the same standard. Protocol I, *supra* note 4, art. 1. Non-international armed conflicts, on the other hand, attract two different levels of regulation. Common Article 3 to the Geneva Conventions of 1949, which the International Court of Justice regarded as customary in the case concerning military and paramilitary activities in Nicaragua, applies to all armed conflicts not of an international character. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). Protocol II applies to a narrower range of conflicts not of an international character. Protocol II, *supra* note 4, art. 1.

⁶ *Hors de combat* is the term used to describe combatants who are incapacitated through sickness or wounds or who have surrendered and thus no longer pose a threat. For a description of when an enemy combatant is *hors de combat* see ALLAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR* 420-24 (1976).

⁷ Although not often articulated by commentators and military commanders, there is no doubt that the rape of women has been and still is regarded as a perk of warfare. See *infra* note 53 and accompanying text.

⁸ See sources cited *supra* note 2; Judith G. Gardam, *Noncombatant Immunity and the Gulf Conflict*, 32 VA. J. INT'L L. 813 (1992).

⁹ Sandra Harding, *Introduction: Is There a Feminist Methodology?*, in *FEMINISM AND METHODOLOGY* 6 (Sandra Harding ed., 1987). See also V. Spike Peterson, *Introduction to GENDERED STATES: FEMINISTS (RE) VISIONS OF INTERNATIONAL RELATIONS THEORY* 8-10 (V. Spike Peterson ed., 1992) [hereinafter *GENDERED STATES*].

¹⁰ See V. Spike Peterson, *Security and Sovereign States: What is at Stake in Taking Feminism Seriously*, in *GENDERED STATES*, *supra* note 9, at 31, 49-56; Judith H. Stiehm, *The Protected, the Protector, the Defender*, in *WOMEN AND MEN'S WARS* 367 (Judith H. Stiehm ed., 1983) (previously published as a special issue of 5 *WOMEN'S STUD.INT'L F.* 245-377 (1982)).



¹¹ See J. ANN TICKNER, GENDER IN INTERNATIONAL RELATIONS: FEMINIST PERSPECTIVES ON ACHIEVING GLOBAL SECURITY 6-7, 40 (1992). See also Sarah Ruddick, Mothers and Men's Wars, in ROCKING THE SHIP OF STATE: TOWARDS A FEMINIST PEACE POLITICS 77 (Adrienne Harris & Ynestra King eds., 1989). The relationship between men's sexuality, war, and sexism itself is an integral part of this analysis. See, e.g., BROWNMILLER, *supra* note 1; Nancy Hartsock, *Prologue to a Feminist Critique of War and Politics*, in WOMEN'S VIEWS OF THE POLITICAL WORLD OF MEN 123 (Judith H. Stiehm ed., 1984); See generally BETTY REARDON, SEXISM AND THE WAR SYSTEM (1985); ROBIN MORGAN, THE DEMON LOVER ON THE SEXUALITY OF TERRORISM (1989). The threat that constructed feminine values pose for this idealized form of masculinity is well illustrated by other writers. See TICKNER, *supra*, at 39 (discussing the writings of Machiavelli) and REARDON, *supra*, at 4, 30-31, 34-35 (although the latter seems to accept that feminine values are not merely constructs but inherent feminine values).

¹² For a discussion of homosexuality as one devalued form of masculinity, see REARDON, *supra* note 11, at 30. The recent uproar in the U.S. military establishment over President Clinton's attempt to lift the ban on the participation of homosexuals in the armed forces illustrates this point.

¹³ See TICKNER, *supra* note 11, at 6-7, 38-39.

¹⁴ The gender attributes of the notions of national security and the State itself have been subjected to scrutiny by feminists. See generally REARDON, *supra* note 11; Hartsock, *supra* note 11; CYNTHIA ENLOE, BANANAS, BEACHES AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS (1989); GENDER AND INTERNATIONAL RELATIONS (Rebecca Grant & Kathleen Newland eds., 1991); GENDERED STATES, *supra* note 9; TICKNER, *supra* note 11. Cf. Monica Harrington, *What Exactly Is Wrong with the Liberal State as an Agent of Change?*, in GENDERED STATES, *supra* note 9, at 65. The work of international relations theorists can provide many insights to international lawyers whose discipline focuses on the relations between States. Thus the nature of this institution and its gender aspects are fundamental to feminist scholarship in international law. Although for many years resistant to feminist analysis, international law and the State are coming under increasing scrutiny. See, e.g., Hilary Charlesworth *et al.*, *Feminist Approaches to International Law*, 85 AM.J.INT'L L. 613 (1991). See also Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) [hereinafter MacKinnon, *An Agenda for Theory*]; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence*, 8 SIGNS 635 (1983) [hereinafter MacKinnon, *Towards Feminist Jurisprudence*]; CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE (1989).

¹⁵ For example, the rules in relation to the treatment of prisoners of war are extremely detailed and specific. They, moreover, have a long and complex history. See generally ROSAS, *supra* note 6.

¹⁶ For example, the United States recently lifted its restrictions on women flying aircraft in combat. For a study of past and present policies of the United States in relation to this issue, see Christopher Horrigan, *The Combat Exclusion Rule and Equal Protection*, 32 SANTA CLARA L.REV. 229 (1992) and James D. Milko, *Beyond the Persian Gulf: Expanding the Role of Servicewomen in the United States Military*, 41 AM. U. L. REV. 1301 (1992). For a summary of the practices of other States in relation to women in combat positions, see Ellen Symons, *Under Fire: Canadian Women in Combat*, 4 CAN. J. WOMEN & L. 477, 486-88 (1990).

¹⁷ There is no unanimity among commentators as to the definitions and divisions in the law of armed conflict, or humanitarian law as it is increasingly referred to. For a comprehensive analysis of the scope and content of humanitarian law, see JEAN S. PICTET, THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW (1966) and, by the same author, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS (1975).

¹⁸ Although nearly all civilizations throughout history have placed some restraints on behavior in war, the attempt to establish a system of binding international law did not begin until the codification of the law of armed conflict in the latter half of the nineteenth century. Up to this stage the laws of war were of a customary nature only. For a comprehensive collection of the conventional rules of the Law of Geneva see THE INTERNATIONAL RED CROSS HANDBOOK (12th ed. 1983). See also DOCUMENTS ON THE LAWS OF WAR, *supra* note 4.

¹⁹ See JEAN S. PICTET, INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW xi-xx (1988).

²⁰ On the initiative of the International Committee of the Red Cross, the totality of the law of armed conflict is often referred to nowadays as the humanitarian law of armed conflict.

²¹ See, e.g., ROSAS, *supra* note 6, at 41-42.

²² This is true also on a more general level. It is more difficult to achieve agreement on the development of so called "game rules" for the protection of combatants than rules that do not interfere with the general conduct of hostilities. The negotiation of the Hague Conventions of 1899 and 1907, a primary source of the law of warfare proper, was a complex



and exacting process. Convention II Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

²³ For a comprehensive analysis of the proceedings of the Diplomatic Conference and the provisions of Protocols I and II, see MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* (1982); *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949* (Yves Sandoz et al. eds., 1987). For a description of the work of the Conference see Richard Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV.INT'L L.J. 1 (1976); David Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM.J.INT'L L. 77 (1975); Charles L. Cantrell, *Humanitarian Law in Armed Conflict: The Third Diplomatic Conference*, 61 MARQ.L.REV. 253 (1977); L.C. Green, *The Geneva Humanitarian Law Conference 1975*, 13 CAN.Y.B.INT'L L. 295 (1975).

²⁴ See *infra* note 33 and accompanying text.

²⁵ Civilians have always suffered in armed conflict but until the advent of aerial bombardment in World War I they were to a large extent isolated from the battlefield itself. They were most vulnerable after the battle had ceased and during occupation. See A.P. HIGGINS, *NON-COMBATANTS AND THE WAR* 15 (1914). All this changed with the development of air warfare and other methods of warfare of mass destruction. For a description of aerial bombardment during World War I, see M. COOPER, *THE BIRTH OF INDEPENDENT AIR POWER* (1986).

²⁶ For details of the loss of civilian lives during World War II, to a large extent attributable to the saturation aerial bombardment of civilian targets such as Leipzig, Dresden and Cologne, see W. Hays Parks, *Air War and the Law of War*, 32 A.F.L.REV. 1 (1990). See also HOWARD LEVIE, *WHEN BATTLE RAGES, HOW CAN LAW PROTECT?* 24 (1970).

²⁷ See *COMMENTARY ON THE IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 10 (Jean S. Pictet ed., 1958) [hereinafter *COMMENTARY ON THE IV GENEVA CONVENTION*]

²⁸ In 1922-23 an international conference of six States was held at The Hague to formulate a code of rules for the regulation of aircraft and radio in time of war. In 1923 the Commission of Jurists established by the conference produced the Hague Rules of Air Warfare. The Rules were never ratified by States.

²⁹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 5; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 5; Convention Relative to the Treatment of Prisoners of War, *supra* note 5.

³⁰ See Protocol I, *supra* note 4, art. 48.

³¹ Central to the scheme is the prohibition in Article 51, paragraph 4, of indiscriminate attacks. Paragraph 5 of the Article provides examples of attacks which are to be considered as indiscriminate and includes attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Article 57, paragraph 2(a)(iii), requires planners of attacks to suspend or cancel an attack if, *inter alia*, it will result in excessive casualties. Such casualties are determined by the same formula as that in paragraph 5(b) of Article 51. *Id.* arts. 51, 57.

³² For example, of the States actively involved in the conduct of the Persian Gulf War, namely Iraq, France, Kuwait, Saudi Arabia, the United States and the United Kingdom, only Kuwait and Saudi Arabia have ratified or acceded to the Protocol.

³³ For example, the provisions of the Protocol relating to civilian protection have been declared to be militarily unacceptable by the Joint Chiefs of Staff. See Abraham D. Sofaer, *The U.S. Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: The Rationale for the United States Decision*, 82 AM.J.INT'L L. 784 (1988). For a detailed military criticism of the provisions of Protocol I, including those relating to the protection of civilians by W. Hays Parks, Head of the International Law Team of the Office of the Judge Advocate-General of the Army, see Parks, *supra* note 26. For further details of the attitude of the United States military to the provisions of the Protocol protecting civilians, see *The Sixth Annual American Red Cross--Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM.U.J.INT'L L. & POL'Y 415 (1987) [hereinafter *Conference on International Humanitarian Law*]; *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the U.S. Decision not to Ratify*, 81 AM.SOC'Y INT'L L.PROC. 26, 30 (1987).



³⁴ I am referring here to the concept of indiscriminate attacks. See *supra* note 31. For a discussion of the impact of State practice in the Persian Gulf conflict on the meaning of indiscriminate attacks, see Gardam, *supra* note 8, at 831-32.

³⁵ Even if the actions of one State constitute an illegal use of force contrary to Article 2(4) of the U.N. Charter, the response to the aggressor State must be in conformity with the applicable rules of humanitarian law. See, e.g., the preamble to Protocol I, which reads in part:

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

Protocol I, *supra* note 4, pmb1. This principle has been one of the most difficult to establish and maintain throughout the centuries. In fact the denunciation of the action of Iraq by a newly effective Security Council has arguably placed this vital principle under considerable strain. It has allowed actions by the coalition forces that appear questionable under the legal rules. See, e.g., WALZER, *supra* note 1, at xx-xxii.

³⁶ For a general study of the principle of non-combatant immunity in the law of armed conflict, see JUDITH G. GARDAM, *NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW* (1992).

³⁷ See JAMES T. JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR* 133-36 (1981).

³⁸ See JEFFREY B. RUSSELL, *HISTORY OF MEDIEVAL CHRISTIANITY, PROPHECY AND ORDER: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION* 25 (1968).

³⁹ For an account of the evolution of non-combatant immunity, from its earliest foundations in primitive and ancient warfare to modern times, see RICHARD S. HARTIGAN, *THE FORGOTTEN VICTIM: A HISTORY OF THE CIVILIAN* (1982).

⁴⁰ See JENNY TEICHMAN, *PACIFISM AND THE JUST WAR: A STUDY IN APPLIED PHILOSOPHY* 3 (1986). There are many just war theories as most civilizations have had highly developed rules relating to the justness of the resort to war. However, the Christian theory of the just war formed the basis of the secular just war theory of such writers as Grotius and Vattel and had a considerable impact on the development of the law of war, including the principle of non-combatant immunity. For a description of the development of the Christian theory of the just war and on the modern form of this theory, see generally ROLAND BAINTON, *CHRISTIAN ATTITUDES TOWARD WAR AND PEACE* (1960); JAMES T. JOHNSON, *IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS* (1975); JOHNSON, *supra* note 37; PAUL RAMSEY, *WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY?* (1961); FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* (1975); TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* (1970); WALZER, *supra* note 1; WILLIAM V. O'BRIEN, *THE CONDUCT OF THE JUST AND LIMITED WAR* (1981).

⁴¹ See, e.g., sources cited *id.*

⁴² For accounts of women's experience in modern warfare, see generally *WOMEN, WAR, AND REVOLUTION* (Carol R. Berkin & Clara M. Lovett eds., 1980); *BEHIND THE LINES: GENDER AND THE TWO WORLD WARS* (Margaret R. Higgonnet et al. eds., 1987). As Christine Chinkin writes, the experience of women in war is not all negative; however, most of the gains are lost after the end of the armed conflict. Chinkin, *Peace and Force*, *supra* note 1.

⁴³ For a description of the principle of double effect in relation to abortion and in relation to non-combatant immunity, see RAMSEY, *supra* note 40, at 47-48, 65, 171-82.

⁴⁴ JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT: AND DISCOURSES* (G.D.H. Cole trans., 1973).

⁴⁵ For a description of the Peace of God, see RUSSELL, *supra* note 40, at 39; HARTIGAN, *supra* note 39, at 65-75.

⁴⁶ JOHNSON, *supra* note 37, at 127. The Peace of God was drawn up during the reign of Pope Gregory IX and listed eight classes of persons who were entitled to full protection from the direct effects of warfare. Although women had been included in Gratian's *Decretum*, on which the concept of certain categories of persons being immune from warfare was based, they were not included in the Peace of God. See RUSSELL, *supra* note 40, at 70. Johnson, in assessing the basis for this omission, concludes that it was either because the immunity of these classes of persons was already acknowledged and provided for under the rules of chivalry or the result of the self-interest of the Church. JOHNSON, *supra* note 37, at 132-33.

⁴⁷ JOHNSON, *supra* note 37, at 133-36. In chivalric tradition women were at the center of the highly elaborate precepts of romantic chivalry. See, e.g., RICHARD BARBER, *THE KNIGHT AND CHIVALRY* 71-76 (1974). The focus of the military chivalric tradition was to regulate the conduct of warfare between knights. For a description of the military code of chivalry, see MAURICE KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* (1965).

⁴⁸ JOHNSON, *supra* note 37, at 136.

⁴⁹ As Johnson points out, there were notable exceptions, for example, Eleanor of Aquitaine and Joan of Arc. These women were, however, regarded with contempt by the knightly classes for their unfeminine behavior. *Id.*

⁵⁰ See Stiehm, *supra* note 10; TICKNER, *supra* note 11, at 28, 58. The argument that women are unsuited for combat roles is being eroded as modern warfare becomes increasingly technological. For an analysis of the validity of the exclusion of women from combat roles in light of experience in the Persian Gulf conflict, see Milko, *supra* note 16, at 1314-17.

⁵¹ See TICKNER, *supra* note 11, at 36-41.

⁵² See BROWNMILLER, *supra* note 1, at 3-113. See also Best, *supra* note 1, at 26; WALZER, *supra* note 1, at 133-34; Meron, *supra* note 1, at 26, 29-31.



⁵³ See KEEN, *supra* note 47, at 121-22; Meron, *supra* note 1, at 26, 29-31. Theodore Meron writes that rape had been prohibited for centuries by various national military codes and cites those of Richard II and Henry V. Theodor Meron, *Rape as a Crime Under International Law*, 87 AM.J.INT'L L. 424, 425 (1993).

⁵⁴ Rape was specifically prohibited on punishment of death by Article XLIV and XLVII of the Lieber Code of Land Warfare. U.S. DEPT OF WAR, GENERAL ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD (1863). This code was the first attempt since the exposition of the classical law of war by Grotius, Vattel, and Gentili to codify the laws and customs of war and was drawn up by Francis Lieber during the American Civil War for the armies of the United States. The Code was the basis of the work of the Brussels Conference of 1874 and the Oxford Manual of the Institute of International Law, which were themselves the basis of the Hague Conventions on Land Warfare and the annexed Regulations, adopted in 1899 and 1907. See sources cited *supra* note 22; OXFORD MANUAL (adopted by the Institute of International Law at Oxford, 1880), *reprinted in THE LAWS OF ARMED CONFLICTS* 35 (Dietrich Schindler & Jiri Toman eds., 1988). The Brussels Declaration in Article XXXVIII referred only to the need to respect the "honour and rights of the family" and the Oxford Manual required respect for women's honor. Article 46 of the Hague Regulations on Land Warfare annexed to the Hague Conventions of 1899 and 1907 merely repeated the requirement of respect for family honor.

⁵⁵ Although the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties created by the victors in 1919 after World War I to inquire into breaches of the laws of war by Germany and its allies designated rape as a war crime that should lead to criminal responsibility, no prosecutions for rape resulted from the Commission's work. See LEON FRIEDMAN, *THE LAW OF WAR: A DOCUMENTARY HISTORY* 776-77 (1st ed. 1972). Despite the widespread resort to rape in World Wars I and II there was no suggestion that it be included in the jurisdiction of the Nuremberg Tribunal, although there were prosecutions for rape by the International Military Tribunal at Tokyo. The Commission of Government Experts for the Study of the Convention for the Protection of War Victims reported practices of World War II:

when innumerable women of all ages, and even children, were subjected to outrages of the worst kind: rape committed in occupied territories, brutal treatment of every sort, mutilations etc. In areas where troops were stationed, or through which they passed, thousands of women were made to enter brothels against their will, or were contaminated with venereal diseases, the incidence of which often increased on an alarming scale.

COMMENTARY ON THE IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, *supra* note 27, at 205 (citing the Commission of Government Experts for the Study of the Convention for the Protection of War Victims, Geneva, Apr. 14-26, 1947).

⁵⁶ Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 5, art. 27, ¶ 2.

⁵⁷ For a comprehensive description of the exceptions to protected status under the Fourth Convention, see BOTHE ET AL., *supra* note 23, at 442.

⁵⁸ Protocol I, *supra* note 4, art. 76.

⁵⁹ Cf. the suggestion by Bothe that there is still uncertainty as to whether Article 76 applies to a party's own nationals. BOTHE ET AL., *supra* note 23, at 469.

⁶⁰ See, e.g., common Article 146 to the four Geneva Conventions which imposes these obligations on States and the common Article defining grave breaches. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 5, art. 50; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *supra* note 5, art. 51; Convention Relative to the Treatment of Prisoners of War, *supra* note 5, art. 130; Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 5, art. 147. See also Protocol I, *supra* note 4, art. 85, which extended the coverage of grave breaches in the Conventions to include certain other categories of persons and objects. It also added to the list of grave breaches.

⁶¹ See YOUNGINDRA KHUSHALANI, *DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS* 71-73 (1982); Cf. Meron, *supra* note 1, at 31.

⁶² COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 27, at 204.

⁶³ As one commentator explains, the fact that the list of grave breaches in the conventional rules is exhaustive does not prevent other offenses being subject to universal jurisdiction at customary international law. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 23, at 976 n. 11. It is to be hoped that this is the position that the international community is moving towards: that, irrespective of a States' treaty obligations, rape in warfare is a breach of a customary prohibition and subject to universal jurisdiction.

⁶⁴ See a similar approach to Article 3 of the Conventions in COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 27, at 39.

⁶⁵ International Committee of the Red Cross, Update on Aide-Memoire of Dec. 3, 1992 (on file with author). Meron points out that the U.S. Department of State interprets the conventional provisions as including rape as a grave breach. Meron, *supra* note 53, at 427.

⁶⁶ See Judith G. Gardam, *The Law of Armed Conflict: A Feminist Perspective*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 419, 430 (Kathleen E. Mahoney & Paul Mahoney eds., 1993) [hereinafter *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY*].

⁶⁷ See Protocol II, *supra* note 4, art. 1 for its field of application.

⁶⁸ Further indications of a possible change in attitude can be discerned in the recent focus on the so-called "comfort women" used to provide sexual services to Japanese troops during World War II. See USTINIA DOLGOPOL & SNEHAL PARANJAPPE, *COMFORT WOMEN: THE UNFINISHED ORDEAL* (Int'l Comm. of Jurists, 1993). The report concludes that



all parties to the conflict were fully aware at the close of these hostilities as to what had occurred to these women. *Id.* at 2, 3. Clearly, at that time such behavior was not regarded as of any significance and there was never any suggestion that these actions should be included in war crimes trial indictments despite the fact that not only were these women subjected to years of rape and ill-treatment but they died by the thousands.

⁶⁹ See Meron, *supra* note 53.

⁷⁰ *Id.*

⁷¹ Article 5 of the proposed statute gives the tribunal the power to prosecute persons responsible for inter alia rape "directed against the civilian population." See sources cited *supra* note 3.

⁷² Prosecutions for rape in the former Yugoslavia could, as argued above, be covered by the definition of grave breaches set out in Article 2 of the proposed statute of the international tribunal "wilfully causing great suffering or serious injury to body and health." However, the specific reference in the draft statute to rape as a crime against humanity and the fact that the indignation in the international community has been in relation to the systematic nature of these crimes makes this unlikely.

⁷³ See, e.g., *EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia*, *supra* note 3. The mission concluded that the incidence of rape in Bosnia-Herzegovina was not a random by-product of the conflict but a systematic practice carried out under orders to facilitate the ethnic cleansing of the area. See also *Letter Dated 5 November 1992 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General*, U.N.Doc. S/24768 (1993) (France's response to S.C.Res. 771); *Letter Dated 7 January 1993 >From the Permanent Representative of Croatia to the United Nations Addressed to the Secretary-General, with attached annex, The Extent of Violation of Women's Human Rights and Raping as a New Type of War Crime in Croatia and Bosnia and Herzegovina.*, U.N.Doc. S/25082 (1993) (Croatia's response to S.C.Res. 771); S.C.Res. 771, U.N.SCOR, 47th Sess., 3106th mtg., U.N.Doc. S/RES/771 (1992).

⁷⁴ Feminists differ, however, as to the way in which sexual violence controls women's lives. See, e.g., BROWNMILLER, *supra* note 1; MacKinnon, *An Agenda for Theory*, *supra* note 14; MacKinnon, *Towards Feminist Jurisprudence*, *supra* note 14. For an analysis of their views see Judith Vega, *Coercion and Consent: Classic Liberal Concepts in Texts on Sexual Violence*, 16 INT'L J.SOC'Y L. 75 (1988). See also REARDON, *supra* note 11, at 38 (discussing the connection between rape and the war system). Similarly, the objectification of women under patriarchy takes on a particular perspective in conjunction with militarism. Ann Scales, who regards militarism as a prime item on the feminist agenda and in "fundamental symbiosis with gender oppression," refers to "militarism" as "objectification perfected." Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron*, 12 HARV.WOMEN'S L.J. 25, 40-41 (1989). She argues that "[m]ilitarism requires of the participants an expertise in objectification." *Id.* at 44. The enemy must be regarded as a thing or the "other" in order for soldiers to kill in battle. This objectification is already learned in gender terms; women are the "other" and the lesson is transferred to the battlefield.

⁷⁵ The use of crossbows, bows and arrows, and siege machines was banned in wars between Christians by the Second Lateran Council of 1139. See JOHNSON, *supra* note 37, at 128; RUSSELL, *supra* note 40, at 156-57. Johnson queries whether this practice was dictated by considerations of proportionality given that this limitation on weapons was restricted to wars among Christians. Johnson argues that the question of unnecessary suffering caused by the use of these weapons was not the issue. Rather, the ban on such weapons, more likely to be used by soldiers and mercenaries, was an attempt to limit warfare to the knightly classes. JOHNSON, *supra* note 37, at xxiii, 128-39.

⁷⁶ See, e.g., Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, adopted by the International Military Commission, Dec. 11, 1868, reprinted in 1 AM.J.INT'L L.SUPP. 95 (1907) (known as the St. Petersburg Declaration).

⁷⁷ See WALZER, *supra* note 1, at 133-34; BROWNMILLER, *supra* note 1, at 37.

⁷⁸ Protocol I, *supra* note 4, art. 51, ¶ 5(b).

⁷⁹ See *Conference on International Humanitarian Law*, *supra* note 33, at 426 (remarks of Michael J. Matheson).

⁸⁰ See Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM.J.INT'L L. 391, 409 (1993).

⁸¹ See sources cited *supra* note 16. See also Michelle Beneke & Kirsten Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV.WOMEN'S L.J. 215 (1990); Paul E. Roush, *The Exclusionists and their Message*, 39 NAVAL L.REV. 163 (1990). The issue has been highlighted by the participation of women in the Persian Gulf conflict. See Milko, *supra* note 16.

⁸² This issue has been addressed by many feminist writers and conclusions are widely differing. Tickner writes that despite the large scale participation of women in noncombat roles in many States "the relationship between soldiering, masculinity, and citizenship remains very strong in most societies today." TICKNER, *supra* note 11, at 40-41. See also Stiehm, *supra* note 10, at 224 (identifying myths of masculinity that survive irrespective of the realities of the participation of women in the military).

⁸³ Rebecca Grant, *The Quagmire of Gender and International Security*, in GENDERED STATES, *supra* note 14, at 89.

⁸⁴ Much of the writing by feminists in this area is based on the landmark work of Carol Gilligan. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

⁸⁵ Among legal feminists the most trenchant criticism of this view of the nature of women has come from Catharine MacKinnon. See, e.g., Ellen DuBois et al., *Feminist Discourse, Moral Values, and the Law: A Conversation*, 34 BUFF.L.REV. 11 (1984). See also Joan Williams, *Deconstructing Gender*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 95 (Katherine Bartlett & Rosanne Kennedy eds., 1991).

⁸⁶ Although clearly excluded from decision making in relation to the use of force women have made a significant but largely unacknowledged impact in the area of peace research and studies. See Chinkin, *Peace and Force*, *supra* note 1.



See also text accompanying note 61; Christine M. Chinkin, *Women and Peace: Militarism and Oppression*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, *supra* note 66, at 405, 412-15; Abouali Farmanfarmaian, *Did You Measure Up? The Role of Race and Sexuality in the Gulf War*, in COLLATERAL DAMAGE: THE NEW WORLD ORDER AT HOME AND ABROAD 111, 114-15 (Cynthia Peters ed., 1992).

⁸⁷ Grant examines the construction of a feminist theory of international security based on difference and finds it inadequate to cope with gender issues in relation to issues of international security. Grant, *supra* note 83, at 89. The assumption of the different voice of women seems to be inherent to some extent in Judith Stiehm's work with her concept of the citizen defender as the replacement of the citizen warrior. She explores the possibility that the military depends on certain myths and that their maintenance depends on women's absence. See Stiehm, *supra* note 10.

⁸⁸ See DuBois et al., *supra* note 85.

⁸⁹ I owe this idea to a discussion with Ann Tickner.

⁹⁰ The Security Council has increasingly taken an active role in such situations as the conflict in the former Yugoslavia and Somalia. The legal basis of the Security Council's new role is complex. See, e.g., Security Council Resolution 751 establishing the U.N. operation in Somalia (UNOSOM) and Security Council Resolution 794, under Chapter VII of the U.N. Charter, authorizing the Secretary-General and cooperating Member States to secure by all necessary means a secure environment for relief operations in Somalia. S.C.Res. 751, U.N. SCOR, 47th Sess., 3069th mtg., U.N.Doc. S/RES/751 (1992); S.C.Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N.Doc. S/RES/794 (1992).

⁹¹ See, e.g., Scales, *supra* note 72, at 40, 44. See also Stiehm, *supra* note 10, at 371-72. One of the most chilling descriptions of this approach is a quote from Dan G. Loomis, *No Place for a Lady*, THE OTTAWA SUN, Aug. 10, 1989, at 11 (extracted in Symons, *supra* note 16, at 509).

What's so special about groups of young men ranging in size from around a half dozen to a hundred or so? Why can't females join in equally well? Commanding and controlling such groups, once they have been blooded in battle, is a unique experience. It's fascinating and awesome to watch the animal-like bonding taking place as normal, high school-aged males are transformed into savage hunting and killing bands which can be orchestrated into deadly effective combat units for battle.... *Id.*

⁹² For example, according to press reports, one of the heroes of the Bosnian conflict, and clearly a real warrior in traditional terms, is a British soldier, Major Kent-Payne. Significantly his heroic deeds consist of rescuing old women and utilizing considerable negotiating skills in dealing with the warring parties in this conflict. See *White Warriors Lost in the Ether*, THE GUARDIAN, June 19, 1993, at 1. This can be contrasted with the Persian Gulf conflict, for example, where heroes were those involved in activities resulting in wide scale civilian casualties. Obviously, however, there is still a long way to go as the behavior of the U.S. peacekeepers in Somalia demonstrates.

⁹³ The assertion by some commentators of the unilateral right to use force on the grounds of humanitarian intervention is the only exception to this consensus. See, e.g., HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973); FERNANDO TESSON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988). Although the existence of the right to self-defense in international law is uncontroversial, what that right encompasses is the subject of endless debate. See, e.g., IAN BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1958); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 351-58 (1963); D.W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?*, 40 INT'L & COMP.L.Q. 366 (1991); THE CURRENT LEGAL REGULATION OF THE USE OF FORCE (Antonio Cassese ed., 1986).

⁹⁴ The attitude of France towards Protocol I exemplifies this attitude. France objected to many of the provisions of the Protocol designed to protect civilians on the basis that they interfered with the means and methods of warfare and placed the effective conduct of military operations in jeopardy. See GARDAM, *supra* note 36, at 149-51, and particularly at 151 n. 125.

⁹⁵ For example, there are reports of the massive increase in prostitution as a result of the presence of United Nations troops in both Cambodia and Bosnia. See Maggie O'Kane, *The Soldiers are Out of Control: They are Feasting on a Dying City*, THE GUARDIAN, Aug. 26, 1993, at 1.



SUPPLEMENTARY READING 5

THE INTERNATIONAL CRIMINAL COURT: ENSURING JUSTICE FOR WOMEN

"[N]othing prepared me for the actual experience. It lives on inside me. I still bleed a lot. It was done not by just one man, but by a group of them... And it was a side-show; lots of people came to watch."

A Kurdish woman raped by Iraqi security officers.

Fifty years after the adoption of the Universal Declaration of Human Rights (UDHR), discrimination and violence against women continue to be the everyday reality for women worldwide. Human rights violations against women have been ignored or have remained largely hidden despite repeated commitments by governments to the full and equal enjoyment by women of all human rights.

Systematic discrimination and violence against women are reflected in, and reinforced by, the structure and functioning of governmental and intergovernmental institutions. This is partly due to the prevalent gender-insensitive interpretation of international human rights and humanitarian law. Judicial bodies have very often failed to investigate and prosecute suspected perpetrators of violations of women's human rights. National authorities have often neglected, excused, or denied such abuses.

The vulnerability of women to human rights violations is compounded in situations of armed conflict. Only five per cent of the casualties in the First World War were civilians. By the mid-1990s, about 80 per cent of the casualties in conflicts were civilians -- most of them women and children. As the 20th century draws to a close, women who have taken no part in conflicts are being murdered, raped and mutilated.

1998 presents a number of important opportunities for women's human rights advocates to demand that governments at the national and international level work to ensure that the protection and promotion of women's human rights become a reality.[1998 marks the 50th anniversary of the UDHR. In March 1998, the United Nations (UN) Commission on the Status of Women reviewed key sections from the Beijing Declaration and Platform for Action, the final document of the 1995 Fourth UN World Conference on Women. The implementation of the Vienna Declaration and Programme of Action, the final document of the 1993 UN World Conference on Human Rights, is on the agenda of the July 1998 Economic and Social Council meeting.

Among these opportunities, the UN General Assembly has convened a diplomatic conference to create a permanent international criminal court. Such a court would investigate and prosecute genocide, other serious violations of humanitarian law and crimes against humanity where national courts are unable or unwilling to bring those responsible to justice. Since 1993 Amnesty International has been working for the establishment of a just, fair and effective permanent international criminal court as part of its work to end impunity for grave human rights abuses.[See list of papers at the end of this paper.]

Historically access to legal remedies and redress have often been denied to women victims and their families. Amnesty International believes that the international criminal court should



effectively address grave human rights violations against women, including gender-based crimes, to ensure justice for women.

It is imperative that a gender perspective be fully incorporated into the statute of the international criminal court, its rules and the way it functions. This is essential for women and crucial to enjoyment of human rights worldwide.

This paper is part of Amnesty International's work to ensure justice and human rights for women and only addresses the role of the international criminal court in that effort. [back to the top](#)

1. CRIMES AGAINST WOMEN.

Women, like men, are the victims of genocide, other crimes against humanity and serious violations of humanitarian law. However, women are in double jeopardy. Discriminated against as women, they are also as likely as men, if not more so, to become victims of human rights violations. Therefore, a systematic and adequate effort is needed to ensure the investigation and prosecution of, and redress for, crimes committed against women, including gender-specific abuses such as rape and other forms of serious sexual abuse. **In order to ensure justice for women victims and their families, Amnesty International believes it is essential that the permanent international criminal court has jurisdiction over genocide, other crimes against humanity and serious violations of humanitarian law.**

GENOCIDE. As defined in the Convention on the Prevention and Punishment of the Crime of Genocide, genocide involves committing certain acts against members of national, ethnical, racial or religious groups including killings, causing serious harm and preventing births, with intent to destroy the group, as such. Although not explicitly included in this traditional definition, Amnesty International believes that genocide encompasses rape with genocidal intent. Furthermore, **the definition of genocide to be included in the statute of the international criminal court should be interpreted as including other gender-specific crimes when it can be established that such crimes have been committed with genocidal intent.**

OTHER CRIMES AGAINST HUMANITY. Crimes against women have traditionally fallen within the definition of crimes against humanity when women have been the victims of crimes perpetrated by state agents or armed opposition groups on a systematic basis or a large scale, whether these crimes are committed in peace time or during armed conflict. Such crimes against humanity include murder, extermination, "disappearances", torture, deportation across national frontiers and forcible transfers of population within a country, enslavement, persecution on political, racial, religious and other grounds and other inhumane acts. In addition, women have often been the sole target of other crimes against humanity such as systematic and large scale rape and other forms of serious sexual abuse. **It is clear in international law that rape committed by government officials or by armed opposition groups is torture. When committed on a systematic basis or on a large scale, it is a crime against humanity which should be within the court's jurisdiction. In addition, enforced prostitution and some other forms of sexual abuse when committed by government officials or armed opposition groups on a systematic basis or on a large scale, whether in peace time or during armed conflict, should be expressly included in the court's jurisdiction.**

SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW. In contrast to genocide and other crimes against humanity, which can occur during times of peace or armed conflicts,



international humanitarian law applies only to armed conflicts, whether international or internal. Rape perpetrated by soldiers during an international armed conflict is a grave breach of the Geneva Conventions of 1949 (commonly referred to as war crimes) and other forms of serious sexual abuse in such conflicts are also recognized as grave breaches. Similarly, it is now widely recognized that rape and other forms of serious sexual abuse committed by soldiers or armed opposition groups during internal armed conflict are war crimes punishable by international courts.

Humanitarian law seeks to reduce the horrors of international and internal armed conflicts. However, too often human rights violations against women -- particularly gender-specific violations -- have not been investigated let alone prosecuted. Until governments live up to their obligation to eliminate discrimination and violence against women and provide for the thorough, prompt, and impartial investigation and prosecution of gender-specific crimes, such crimes will continue to be a deliberate weapon of war.

The same month Liberian Peace Council (LPC) fighters in Greenville, Sinoe County, were reported to have killed Marie Tokpa, a girl from the Kpelle ethnic group, because she resisted being raped..... Refugees arriving in Côte d'Ivoire from Maryland County reported wilful killings by the LPC as they attacked a National Patriotic Front of Liberia (NPFL) area - one witness described the arrest of a pregnant woman by LPC fighters who slashed her open, removed the baby and left both mother and baby to die. "*Liberia: An opportunity to introduce human rights protection*," Amnesty International (AIIndex: AFR 34/01/95).

The jurisdiction of the international criminal court should include serious violations of humanitarian law in both international and non-international armed conflict.

2.SPECIAL CONSIDERATIONS IN CASES INVOLVING VIOLENCE AGAINST WOMEN.

Effective investigation of crimes against women. Special measures are needed to deal with the particular demands of investigating, prosecuting and judging crimes involving violence against women, including rape and other forms of serious sexual abuse. Women who have suffered such violence may be reluctant to come forward to testify.

Fact-finders **must** have expertise in collecting evidence of violence against women in a sensitive manner. The court should hire investigators and prosecutorial staff with this type of experience and sensitivity if cases involving rape and other forms of serious sexual abuse of women are to be successfully prosecuted without causing unnecessary trauma for the victims and their families. This is particularly important as experience shows that victims and witnesses in such cases are often more likely to confide in and trust other women. Female investigators and prosecutorial staff with the necessary expertise should be available for these cases.

If the draft statute now being considered is amended to give trial judges a more investigative role similar to the practice in some civil law jurisdictions, it will be essential for female judges to be involved in these cases. **All judges, as well as staff of the office of the prosecutor and the registry, should receive adequate training in how to address cases involving violence against women.**



The statute and rules of the court should take into account the special circumstances of cases involving violence against women, to ensure effective prosecution against such violations, without prejudice to the rights of suspects and accused to a fair trial.

It is often difficult to investigate and prosecute crimes against women in the light of the social stigma attached to many such crimes and as a result of the prevalent discrimination both in the legal procedure and in the system. Effective investigation and prosecution of -- in particular, but not only -- gender-specific crimes is paramount to ensure full access to justice for women. As a result, the court must recognize the special difficulties faced by women in making use of the justice system effectively both at the national and international level during all stages of proceedings.

Protection of victims, their families and witnesses. The court must be able to take certain measures to protect women victims, their families and witnesses from reprisals and unnecessary anguish to which they might be exposed in a public trial, without prejudicing the rights of suspects and accused to a fair trial.

The court, in close cooperation with states parties, must take effective security measures to protect victims, their families and witnesses from reprisals. These measures should encompass protection before, during and after the trial until that security threat ends. In developing an effective protection program, the court and states parties should draw upon the successful witness protection programs in many states.

Furthermore, victims and witnesses could suffer considerable mental anguish by having repeatedly to relive horrific events before investigators, prosecutors and judges. These needs are now addressed in the draft statute by giving the court the power to "take necessary measures available to it, to protect the accused, victims and witnesses", supplemented by the power of the prosecutor "to take necessary measures to ensure the confidentiality of information or the protection of any person". **Creative use of the court's legal authority to protect witnesses will be particularly important if it is to successfully prosecute cases concerning women and girl-child victims. The court should also have a victims and witnesses unit to provide effective protection for victims and witnesses.**

Reparations. All victims of grave human rights violations within the court's jurisdiction and their families are entitled to reparations, including restitution, compensation and rehabilitation. **The statute should provide that the court can award such reparations to victims and their families.**

Women suspected and accused. Amnesty International has documented widespread torture, including rape, of women detained on criminal charges. Women suspects provisionally arrested by order of the permanent international criminal court or arrested after indictment will usually be held initially by national authorities. **The statute should include all necessary measures for the protection of women who are suspected or accused of crimes falling within the jurisdiction of the international criminal court. This will include measures such as keeping female detainees separately from men.**

A 27-year-old Muslim woman interviewed by Amnesty International stated that she had been raped by an officer in the Bosnian-Serb army in a house in the town of Kotor Varo_. In June Serbian forces sought to take full-control of the town where local armed Muslims had been



resisting from parts of the town and surrounding area. The victim's husband had been detained by Serbian forces but had managed to escape. After her husband's escape the victim was detained and questioned about her husband for three days in the corridor of a local school where men were being detained, beaten and interrogated.

In late July the victim was taken by uniformed Serbs to a private house in the town. She thought she was to be interrogated and begged not leave her children. She believed the house to be under the control of a local Serbian officer. Inside the officer hit, bit and raped her, keeping an automatic weapon close at hand throughout. She was released after two or three hours. During and after the incident the perpetrator warned her not to let anybody know where she had been or what had happened. He repeated his threats when she was taken again to the house two and a half weeks later. A second Muslim woman, whose husband had been detained, stated that the same officer attempted to rape her in similar circumstances, but was interrupted by a caller at the house. *"Bosnia-Herzegovina: Rape and sexual abuse by armed forces"*. Amnesty International (AI Index: EUR 63/01/93).

3. ENSURING JUSTICE FOR WOMEN IN THE FUNCTIONING OF THE COURT.

Establishing an effective and independent office of the prosecutor. The prosecutor, deputy prosecutor and staff of the office of the prosecutor, who will be acting on behalf of the international community, should be of high moral character, impartial, possessing integrity and independence and highly competent, with experience in criminal cases. Given the importance of crimes against women which fall within the jurisdiction of the court, **the office of the prosecutor will need to recruit women as well as men with a view to balanced representation of men and women. The prosecution will also need a significant number of staff with experience in investigating and prosecuting such crimes. In addition, all staff should receive training in gender sensitive approaches to their work.**

Amnesty International believes that a concerted effort should be made to recruit women at all levels of the office of the prosecutor. This is consistent with the calls by the international community in the 1995 Beijing Platform for Action adopted by the Fourth UN World Conference on Women.

Qualifications and selection of the judges. Judges selected for the court should be persons of high moral character, impartiality, integrity and independence, with experience in criminal law or international law, including international human rights and humanitarian law. Efforts should be made to ensure that candidates are sought from all regions and legal systems of the world. The court should facilitate the nomination and appointment of women with a view to achieving gender balance.

Selection procedures. It is essential to devise a method for selecting the judges which will ensure the selection of the best possible candidates satisfying the proposed qualifications based on merit. **At a minimum, the statute should provide that in making such nominations and in selecting the judges, states should do so only after consultation in an open process with their highest courts, law faculties, bar associations and other non-governmental organizations concerned with criminal justice and human rights, including women's rights.**



Establishing an effective and independent registry. The same considerations applicable to the selection of judges and the prosecutor apply to the registrar and staff of the registrar as highlighted earlier in this paper.

All documents issued by Amnesty International on the international criminal court can be found at the following address <http://www.amnesty.it>. You can also contact the web site at the NGO Coalition for an International Criminal Court for more information and documents about the international criminal court at <http://www.igc.apc.org/icc>.

1) *"The quest for international justice: Defining the crimes and defences for the international criminal court."* (AI Index: IOR 40/02/97);

2) *"The international criminal court: Making the right choices - Part 1: Defining the crimes and permissible defences and initiating a prosecution."* (AI Index: IOR 40/01/97);

3) *"The international criminal court: Making the right choices - Part II: Organizing the court and guaranteeing a fair trial."* (AI Index: IOR 40/11/97);

4) *"The international criminal court: Making the right choices - Part III: Ensuring effective state cooperation"*. (AI Index: IOR 40/13/97);

5) *"The international criminal court: Making the right choices - Part IV: Establishing and financing the court and final clauses."* (AI Index: IOR 40/04/98).



SUPPLEMENTARY READING 6

Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction

Amnesty International

INTRODUCTION

In 1945, the courts of the victorious Allies began exercising universal jurisdiction under Allied Control Council Law No. 10 on behalf of the international community over crimes against humanity and war crimes committed during the Second World War outside their own territories and against victims who were not citizens or residents. However, for half a century afterwards, only a limited number of states provided for universal jurisdiction under their national law for such crimes. No more than a handful of these states had ever exercised such jurisdiction during those 50 years, including Australia, Canada, Israel and the United Kingdom, and then only for crimes committed during the Second World War. Sadly, states failed to exercise universal jurisdiction over grave crimes under international law committed since that war ended, even though almost every single state is a party to at least four treaties giving states parties universal jurisdiction over grave crimes under international law.

The power and duty under international law to exercise universal jurisdiction.

Traditionally, courts of one state would only exercise jurisdiction over persons who had committed a crime in their own territory (territorial jurisdiction). Gradually, international law has recognized that courts could exercise other forms of extraterritorial jurisdiction, such as jurisdiction over crimes committed outside the territory by the state's own nationals (active personality jurisdiction), over crimes committed against the state's essential security interests (protective principle jurisdiction) and, although this form of jurisdiction is contested by some states, over crimes committed against a state's own nationals (passive personality jurisdiction). In addition, beginning with piracy committed on the high seas, international law began to recognize that courts of a state could exercise jurisdiction on behalf of the entire international community over certain grave crimes under international law which were matters of international concern. Since such crimes threatened the entire international framework of law, any state where persons suspected of such crimes were found could bring them to justice. International law and standards now permit, and, in some cases, require states to exercise jurisdiction over persons suspected of certain grave crimes under international law, no matter where these crimes occurred, even if they took place in the territory of another state, involved suspects or victims who are not nationals of their state or posed no direct threat to the state's own particular security interests (universal jurisdiction).

Grave breaches of the Geneva Conventions.

The four Geneva Conventions for the Protection of War Victims of 1949, which have been ratified by almost every single state in the world, require each state party to search for persons suspected of committing or ordering to be committed grave breaches of these Conventions, to bring them to justice in their own courts, to extradite them to states which have made out a *prima facie* case against them or to surrender them to an international criminal court. Grave breaches of those Conventions include any of the following acts committed during an international armed conflict against persons protected by the Conventions (such as shipwrecked sailors, wounded sailors or soldiers, prisoners of war and civilians): wilful killing, torture or inhuman treatment,



including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or an inhabitant of an occupied territory to serve in the forces of the hostile power, wilfully depriving a prisoner of war or an inhabitant of an occupied territory of the rights of fair and regular trial, taking of hostages and unlawfully deporting or transferring or unlawfully confining an inhabitant of an occupied territory.

Genocide, crimes against humanity, extrajudicial executions, enforced disappearances and torture.

It is also now widely recognized that under international customary law and general principles of law states may exercise universal jurisdiction over persons suspected of genocide, crimes against humanity, war crimes in international armed conflict other than grave breaches of the Geneva Conventions and war crimes in non-international armed conflict, extrajudicial executions, enforced disappearances and torture. Crimes against humanity are now defined in the Rome Statute of the International Criminal Court to include the following conduct when committed on a widespread or systematic basis: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other sexual violence, persecution, enforced disappearance, apartheid and other inhumane acts.

It is also increasingly recognized that states not only have the power to exercise universal jurisdiction over these crimes, but also that they have the duty to do so or to extradite suspects to states willing to exercise jurisdiction. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) adopted in 1984 requires states parties when persons suspected of torture are found in their territories to bring them to justice in their own courts or to extradite them to a state able and willing to do so

Exercise by national courts of universal jurisdiction over post-war crimes.

For many years, most states failed to give their courts such jurisdiction under national law. A number of states, most notably in Latin America, enacted legislation providing for universal jurisdiction over certain crimes under international law committed since the Second World War, including Austria, Belgium, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Ecuador, El Salvador, France, Germany, Guatemala, Honduras, Mexico, Nicaragua, Norway, Panama, Peru, Spain, Switzerland, Uruguay and Venezuela. Few of these ever exercised it. However, in the past few years, beginning with the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda (Yugoslavia and Rwanda Tribunals) in 1993 and 1994, states have finally begun to fulfil their responsibilities under international law to enact legislation permitting their courts to exercise universal jurisdiction over grave crimes under international law and to exercise such jurisdiction. Courts in Austria, Denmark, Germany, the Netherlands, Sweden and Switzerland have exercised universal jurisdiction over grave crimes under international law committed in the former Yugoslavia. Courts in Belgium, France and Switzerland have opened criminal investigations or begun prosecutions related to genocide, crimes against humanity or war crimes committed in 1994 in Rwanda in response to Security Council Resolution 978 urging "States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda". Italy and Switzerland have opened criminal investigations of torture, extrajudicial executions and enforced disappearances in Argentina in the 1970s and



1980s. Spain, as well as Belgium, France and Switzerland, have sought the extradition from the United Kingdom of the former head of state of Chile, Augusto Pinochet, who has been indicted for such crimes. On 24 March 1999, the United Kingdom's House of Lords held that he was not immune from criminal prosecution on charges that he was responsible for torture or conspiracy to torture and the Home Secretary has permitted the courts to consider the request by Spain for his extradition on these charges.

The need for states to fill the gap in the Rome Statute by exercising universal jurisdiction.

An overwhelming majority of states at the Diplomatic Conference in Rome in June and July 1998 favoured giving the International Criminal Court the same universal jurisdiction over genocide, crimes against humanity and war crimes which they themselves have. However, as a result of a last-minute compromise in an attempt to persuade certain states not to oppose the Court, the Rome Statute omits such jurisdiction when the Prosecutor acts based on information from sources other than the Security Council. Article 12 limits the Court's jurisdiction to crimes committed within the territory of a state party or on its ships and aircraft and to crimes committed by the nationals of a state party, unless a non-state party makes a special declaration under that article recognizing the Court's jurisdiction over crimes within its territory, on its ships or aircraft or by its nationals. However, the Security Council, acting pursuant to Chapter VII of the United Nations (UN) Charter to maintain or restore international peace and security or in a case of aggression, may refer a situation to the Court involving crimes committed in the territory of a non-state party. The international community must ensure that this gap in international protection is filled. National legislatures in states which have signed and ratified the Rome Statute will need to enact implementing legislation permitting the surrender of accused persons to the Court and requiring their authorities to cooperate with the Court. When enacting such legislation, they should ensure that national courts can be an effective complement to the International Criminal Court, not only by defining the crimes within the Court's jurisdiction as crimes under national law consistently with definitions in the Rome Statute, but also by providing their courts with universal jurisdiction over grave crimes under international law, including genocide, crimes against humanity, war crimes, extrajudicial executions, enforced disappearances and torture. Such steps - by reinforcing an integrated system of investigation and prosecution of crimes under international law - will help reduce and, eventually, eliminate safe havens for those responsible for the worst crimes in the world.

1. *Crimes of universal jurisdiction.* States should ensure that their national courts can exercise universal and other forms of extraterritorial jurisdiction over grave human rights violations and abuses and violations of international humanitarian law. States should ensure that their national courts exercise universal jurisdiction on behalf of the international community over grave crimes under international law when a person suspected of such crimes is found in their territories or jurisdiction. If they do not do so, they should extradite the suspect to a state able and willing to do so or surrender the suspect to an international court with jurisdiction. When a state fails to fulfil this responsibility, other states should request the suspect's extradition and exercise universal jurisdiction. Among the human rights violations and abuses over which national courts may exercise universal jurisdiction under international law are genocide, crimes against humanity, war crimes (whether committed in international or in non-international armed conflict), other deliberate and arbitrary killings and hostage-taking, whether these crimes were committed by state or by non-state actors, such as members of armed political groups, as well as extrajudicial executions, "disappearances" and torture. In defining grave crimes under international law as extraterritorial crimes under their national criminal law, national legislatures should ensure that the crimes are defined in ways consistent with international law and standards, as reflected in



international instruments such as the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the annexed Hague Regulations Respecting the Laws and Customs of War on Land (1907), the Nuremberg and Tokyo Charters (1945 and 1946), Allied Control Council Law No. 10 (1945), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the four Geneva Conventions for the Protection of Victims of War (1949) and their two Additional Protocols (1977), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) (1984), the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989), the UN Declaration on the Protection of All Persons from Enforced Disappearance (1992), the Draft Code of Crimes against the Peace and Security of Mankind (1996) and the Rome Statute of the International Criminal Court (1998). In defining these crimes national legislatures should also take into account the Statutes and jurisprudence of the Yugoslavia and Rwanda Tribunals.

National legislatures should ensure that under their criminal law persons will also be liable to prosecution for extraterritorial inchoate and ancillary crimes, such as conspiracy to commit genocide and attempt to commit grave crimes under international law, direct and public incitement to commit them or complicity in such crimes. National laws should also fully incorporate the rules of criminal responsibility of military commanders and civilian superiors for the conduct of their subordinates.

2. *No immunity for persons in official capacity.* National legislatures should ensure that their national courts can exercise jurisdiction over anyone suspected or accused of grave crimes under international law, whatever the official capacity of the suspect or accused at the time of the alleged crime or any time thereafter. Any national law authorizing the prosecution of grave crimes under international law should apply equally to all persons irrespective of any official or former official capacity, be it head of state, head or member of government, member of parliament or other elected or governmental capacity. The Charters of the Nuremberg and Tokyo Tribunals, the Statutes of the Yugoslavia and Rwanda Tribunals and the Rome Statute of the International Criminal Court have clearly confirmed that courts may exercise jurisdiction over persons suspected or accused of grave crimes under international law regardless of the official position or capacity at the time of the crime or later. The Nuremberg Charter provided that the official position of a person found guilty of crimes against humanity or war crimes could not be considered as a ground for mitigating the penalty.

The UN General Assembly unanimously affirmed in Resolution 95 (I) on 11 December 1946 “the principles of international law recognized in the Charter of the Nuremberg Tribunal and the judgment of the Tribunal”. These principles have been applied by national, as well as international, courts, most recently in the decision by the United Kingdom’s House of Lords that the former head of state of Chile, Augusto Pinochet, could be held criminally responsible by a national court for the crime under international law of torture.

3. *No immunity for past crimes.* National legislatures should ensure that their courts can exercise jurisdiction over grave crimes under international law no matter when they occurred. The internationally recognized principle of *nullum crimen sine lege* (no crime without a prior law), also known as the principle of legality, is an important principle of substantive criminal law. However, genocide, crimes against humanity, war crimes and torture were considered as crimes under general principles of law recognized by the international community before they were codified. Therefore, national legislatures should ensure that by law courts have extraterritorial criminal jurisdiction over grave crimes under international law no matter when committed. As Article 15 (2) of the International Covenant on Civil and Political Rights (ICCPR) makes clear, such legislation



is fully consistent with the *nullum crimen sine lege* principle. That provision states that nothing in the article prohibiting retrospective punishment “shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”. Thus, the failure of a state where the crime under international law took place to have provided at the time the conduct occurred that it was a crime under national law does not preclude that state - or any other state exercising universal jurisdiction on behalf of the international community – from prosecuting a person accused of the crime 4. *No statutes of limitation*. National legislatures should ensure that there is no time limit on the liability to prosecution of a person responsible for grave crimes under international law.

It is now generally recognized that time limits found in many national criminal justice systems for the prosecution of ordinary crimes under national law do not apply to grave crimes under international law. Most recently, 120 states voted on 17 July 1998 to adopt the Rome Statute of the International Criminal Court, which provides in Article 29 that genocide, crimes against humanity and war crimes “shall not be subject to any statutes of limitations”. Similarly, the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968) states that these crimes are not subject to any statutes of limitation regardless when they were committed. Neither the UN Principles on the Effective Prevention and Punishment of Extra-legal, Arbitrary and Summary Executions nor the Convention against Torture contain provisions exempting states from the duty to bring to justice those responsible for such crimes through statutes of limitations. The international community now considers that when enforced disappearances are committed on a widespread or systematic basis, they are not subject to statutes of limitations. Article 29 of the Rome Statute of the International Criminal Court provides that crimes within the Court’s jurisdiction, including enforced disappearances when committed on a widespread or systematic basis, are not subject to statutes of limitation, and Article 17 of the Statute permits the Court to exercise its concurrent jurisdiction when states parties are unable or unwilling genuinely to investigate or prosecute such crimes. Thus, the majority of states have rejected as out of date that part of Article 17 (3) in the UN Declaration on the Protection of All Persons from Enforced Disappearances which appears to permit statutes of limitation for enforced disappearances. However, even to the limited extent that this provision still has any force, it requires that where statutes of limitations exist they shall be “commensurate with the extreme seriousness of the offence”, and Article 17 (2) states that when there are no effective remedies available, statutes of limitations “be suspended until these remedies are re-established”. Moreover, the Declaration also clearly establishes that “[a]cts constituting enforced disappearances shall be considered a *continuing offence* [emphasis added] as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified” (Article 17(1)).

5. *Superior orders, duress and necessity should not be permissible defences*. National legislatures should ensure that persons on trial in national courts for the commission⁸ of grave crimes under international law are only allowed to assert defences that are consistent with international law. Superior orders, duress and necessity should not be permissible defences. Superior orders should not be allowed as a defence. The Nuremberg and Tokyo Charters and the Statutes of the Yugoslavia and Rwanda Tribunals all exclude superior orders as a defence. Article 33 (2) of the Rome Statute of the International Criminal Court provides that “orders to commit genocide or crimes against humanity are manifestly unlawful”, and, therefore, superior orders are prohibited as a defence with respect to these crimes. Article 33 (1) provides that a superior order does not relieve a person of criminal responsibility unless three exceptional circumstances are present: “(a) The person was under a legal obligation to obey orders of the Government or superior in question; (b) The person did not know the order was unlawful; and (c) The order was not manifestly unlawful.” Since subordinates are only required to obey lawful



orders, most military subordinates receive training in humanitarian law and the conduct within the Court's jurisdiction is all manifestly unlawful, the number of situations where superior orders could be a defence in the Court to war crimes are likely to be extremely rare. In any event, this defence is limited to cases before the Court and does not affect current international law prohibiting superior orders as a defence to war crimes in national courts or other international courts. Principle 19 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states that "an order from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions". Article 6 of the UN Principles on the Protection of All Persons from Enforced Disappearances provides: "No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it." Similarly, Article 2 (3) of the Convention against Torture states: "An order from a superior officer or a public authority may not be invoked as a justification of torture." Duress or coercion (by another person) should also be excluded as a permissible defence. In many cases, and certainly in war crimes cases, allowing duress or coercion as a defence would enable defendants to assert the superior orders defence in disguise. In many national systems of criminal law duress or coercion is a permissible defence to ordinary crimes, if the harm supposedly inflicted by the defendant is less than the serious bodily harm he or she had to fear, had he or she withstood the duress or coercion. In cases such as genocide, crimes against humanity, extrajudicial executions, enforced disappearance and torture it is hard to conceive how committing such crimes could result in the lesser harm. However, duress or coercion can, in some cases, be considered as a mitigating circumstance when determining the appropriate sentence for such grave crimes. No circumstances such as state of war, state of siege or any other state of public emergency should exempt persons who have committed grave crimes under international law from criminal responsibility on the ground of necessity. This principle is recognized in provisions of a number of instruments, including Article 2 (2) of the Convention against Torture, Article 7 of the UN Declaration on the Effective Protection of All Persons from Enforced Disappearances and Article 19 of the UN Principles on the Effective Prevention and Punishment of Extra-legal, Arbitrary and Summary Executions.

6. *National laws and decisions designed to shield persons from prosecution cannot bind courts in other countries.* National legislatures should ensure that national courts are allowed to exercise jurisdiction over grave crimes under international law in cases where the suspects or accused were shielded from justice in any other national jurisdiction. The international community as a whole has a legitimate interest in the prosecution of grave crimes under international law in order to deter the commission of such crimes in the future, to punish the commission of these crimes in the past and in order to contribute to the redress for victims. Indeed, each state has a duty to do so on behalf of the entire international community. Therefore, when one state fails to fulfil its duty to bring those responsible for such crimes to justice, other states have a responsibility to act. Just as international courts are under no obligation to respect decisions of the judicial, executive or legislative branch of government in a national jurisdiction aimed at shielding perpetrators of these crimes from justice by amnesties, sham criminal procedures or any other schemes or decisions, no national court exercising extraterritorial jurisdiction over such crimes is under an obligation to respect such steps in other jurisdictions to frustrate international justice. Bringing perpetrators to justice who were shielded from justice in another national jurisdiction is fully consistent with the *ne bis in idem* principle (the prohibition of double jeopardy) that no one should be brought to trial or should be punished for the same crime twice in the same jurisdiction. As the Human Rights Committee, a body of experts established under the ICCPR to monitor implementation of that treaty has explained, Article 14 (7) of the ICCPR "does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." (*A.P. v.*



Italy, NO. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, U.N. Doc. CCPR/C/OP/2, U.N. Sales No. E.89.XIV.1). The International Law Commission, a body of experts established by the UN General Assembly to codify and progressively develop international law, has declared that “international law [does] not make it an obligation for States to recognize a criminal judgement handed down in a foreign State” and that where a national judicial system has not functioned independently or impartially or where the proceedings were designed to shield the accused from international criminal responsibility, “the international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process” (Report of the International Law Commission’s 48th session - 6 May to 26 July 1996, U.N. Doc. A/51/10, 1996, p. 67).

Provisions in the Statutes of the Yugoslavia and Rwanda tribunals and the Rome Statute of the International Criminal Court which permit international courts to try persons who have been acquitted by national courts in sham proceedings or where other national decisions have shielded suspects or the accused from international justice for grave crimes under international law are, therefore, fully consistent with international law guaranteeing the right to fair trial.

7. *No political interference.* Decisions to start or stop an investigation or prosecution of grave crimes under international law should be made only by the prosecutor, subject to appropriate judicial scrutiny which does not impair the prosecutor’s independence, based solely on legal considerations, without any outside interference. Decisions to start, continue or stop investigations or prosecutions should be made on the basis of independence and impartiality. As Guideline 14 of the UN Guidelines on the Role of Prosecutors makes clear, “Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.” Moreover, Guidelines 13 (a) and (b) provide that decisions to initiate or continue prosecutions should be free from political, social, religious, racial, cultural, sexual or any other kind of discrimination and should be guided by international obligations of the state to bring, and to help bring, perpetrators of serious violations of human rights and international humanitarian law to justice, the interests of the international community as a whole and the interests of the victims of the alleged crimes..

8. *Grave crimes under international law must be investigated and prosecuted without waiting for complaints of victims or others with a sufficient interest.* National legislatures should ensure that national law requires national authorities exercising universal jurisdiction to investigate grave crimes under international law and, where there is sufficient admissible evidence, to prosecute, without waiting for a complaint by a victim or any other person with a sufficient interest in the case. The duty to bring to justice on behalf of the international community those responsible for grave crimes under international law requires that states not place unnecessary obstacles in the way of a prosecution. For example, there should be no unnecessary thresholds such as a requirement that an investigation or prosecution can only start after a complaint by a victim or someone else with a sufficient interest in the case. If there is sufficient evidence to start an investigation or sufficient admissible evidence to commence a prosecution, then the investigation or prosecution should proceed. Only in an exceptional case would it ever be in the interest of justice, which includes the interests of victims, not to proceed in such circumstances.

9. *Internationally recognized guarantees for fair trials.* National legislatures should ensure that criminal procedure codes guarantee persons suspected or accused of grave crimes under international law all rights necessary to ensure that their trials will be fair and prompt in strict accordance with international law and standards for fair trials. All branches of government, including the police, prosecutor and judges, must ensure that these rights are fully



respected. Suspects and accused must be accorded all rights to a fair and prompt trial recognized in international law and standards. These rights are recognized in provisions of a broad range of international instruments, including Articles 9, 10 and 11 of the Universal Declaration of Human Rights, Articles 9, 14 and 15 of the ICCPR, the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), Articles 7 and 15 of the Convention against Torture, the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of the Prosecutors and the UN Basic Principles on the Role of Lawyers. These rights are also recognized in the Rome Statute of the International Criminal Court and the Statutes and Rules of Procedure and Evidence of the Yugoslavia and Rwanda Tribunals, as well as in the Geneva Conventions and their Protocols.

When a suspect or an accused is facing trial in a foreign jurisdiction it is essential that he or she receive translation and interpretation in a language he or she fully understands and speaks in every stage of the proceedings, during questioning as a suspect and from the moment he or she is detained. The right to translation and interpretation is part of the right to prepare a defence. Suspects and accused have the right to legal assistance of their own choice at all stages of the criminal proceedings, from the moment they are questioned as a suspect or detained. When a suspect is detained in a jurisdiction outside his or her own country, the suspect must be notified of his or her right to consular assistance, in accordance with the Vienna Convention on Consular Relations and Principle 16 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The latter provision states that if the person is a refugee or is otherwise under the protection of an international organization, he or she must be notified of the right to communicate with the competent international organization. To ensure that the right to be tried in one's presence, recognized in Article 14 (3) (d) of the ICCPR, is fully respected and the judgments of courts are implemented, national legislatures should ensure that legislation does not permit trials *in absentia* in cases of grave crimes under international law. Neither the Rome Statute of the International Criminal Court nor the Statutes of the Yugoslavia and Rwanda Tribunals provide for trials *in absentia*.

10. *Public trials in the presence of international monitors.* To ensure that justice is not only done but also seen to be done, intergovernmental and non-governmental organizations should be permitted by the competent national authorities to attend and monitor the trials of persons accused of grave crimes under international law. The presence and the public reports by international monitors of the trials of persons accused of grave crimes under international law will clearly demonstrate that the fair prosecution of these crimes is of interest to the international community as a whole. The presence and reports of these monitors will also help to ensure that the prosecution of these crimes will not go unnoticed by victims, witnesses and others in the country where the crimes were committed. The presence and reports of international monitors at a public trial serves the fundamental principle of criminal law that justice must not only be done, but be seen to be done, by helping to ensure that the international community trusts and respects the integrity and fairness of the proceedings, verdicts and sentences. When trials are fair and prompt, then the presence of international monitors can assist international criminal courts in determining that there will be no need to exercise their concurrent jurisdiction over such crimes. Therefore, courts should invite intergovernmental and non-governmental organizations to observe such trials.

11. *The interests of victims, witnesses and their families must be taken into account.* National courts must protect victims, witnesses and their families. Investigation of crimes must take into account the special interests of vulnerable victims and witnesses, including women and children. Courts must award appropriate redress to victims and their families. States must take effective



security measures to protect victims, witnesses and their families from reprisals. These measures should encompass protection before, during and after the trial until that security threat ends. Since investigation and prosecution of grave crimes under international law is a responsibility of the entire international community, all states should assist each other in protecting victims and witnesses, including through relocation programs. Protection measures must not, however, prejudice the rights of suspects and accused to a fair trial, including the right to cross-examine witnesses. Special measures are needed to deal with the particular demands of investigating, prosecuting and judging crimes involving violence against women, including rape and other forms of sexual violence. Women who have suffered such violence may be reluctant to come forward to testify. Prosecutors must ensure that investigators have expertise in a sensitive manner. Investigations must be conducted in a manner which does not cause unnecessary trauma to the victims and their families. Investigation and prosecution of crimes against children and members of other vulnerable groups also will require a special sensitivity and expertise. Courts must award victims and their families with adequate redress. Such redress should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

12. *No death penalty or other cruel, inhuman or degrading punishment.* National legislatures should ensure that grave crimes under international law are not punishable by the death penalty or any other cruel, inhuman or degrading punishment. Amnesty International believes that the death penalty violates the right to life guaranteed by Article 3 of the Universal Declaration of Human Rights and is the ultimate form of cruel, inhuman and degrading punishment prohibited by Article 5 of that Declaration. It should never be imposed for any crime, no matter how serious. Indeed, the Rome Statute of the International Criminal Court and the Statutes of the Yugoslavia and Rwanda Tribunals exclude this penalty for the worst crimes in the world: genocide, crimes against humanity and war crimes. National legislatures should also ensure that prison sentences are served in facilities and under conditions that meet the international standards for the protection of persons in detention such as the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. To ensure that the treatment in prison of those convicted for grave crimes under international law is in accordance with international standards on the treatment of prisoners, international monitors, as well as the consul of the convicted person's state, should be allowed regular, unrestricted and confidential access to the convicted person.

13. *International cooperation in investigation and prosecution.* States must fully cooperate with investigations and prosecutions by the competent authorities of other states exercising universal jurisdiction over grave crimes under international law. The UN General Assembly has declared that all states must assist each other in bringing to justice those responsible for grave crimes under international law. In Resolution 3074 (XXVIII) of 3 December 1973 it adopted the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity which define the scope of these responsibilities in detail. In addition, states parties under the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions for the Protection of Victims of War and their First Additional Protocol, the UN Convention against Torture are required to assist each other in bringing those responsible for genocide, war crimes and torture to justice. The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and the UN Declaration on the Protection of All Persons from Enforced Disappearance require states to cooperate with other states by extraditing persons accused of extrajudicial executions or enforced disappearances if they do not bring them to justice in their own courts. National legislatures should ensure that the competent authorities are required under national law to assist the authorities of other states in investigations and prosecutions of grave crimes under international law, provided that such proceedings are in accordance with



international law and standards and exclude the death penalty and other cruel, inhuman or degrading punishment. Such assistance should include the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons and the extradition of accused persons.

14. *Effective training of judges, prosecutors, investigators and defence lawyers.* National legislatures should ensure that judges, prosecutors and investigators receive effective training in human rights law, international humanitarian law and international criminal law. They should be trained concerning the practical implementation of relevant international instruments, state obligations deriving from these instruments and customary law, as well as the relevant jurisprudence of tribunals and courts in other national and international jurisdictions. Judges, prosecutors, investigators and defence lawyers should also receive proper training in culturally sensitive methods of investigation and in methods of investigating and prosecuting grave crimes under international law against women, children and other persons from vulnerable groups.



SUPPLEMENTARY READING 7

The 1977 Protocols: a landmark in the development of international humanitarian law

by René Kosirnik

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Drafting the 1977 Protocols: an arduous but successful task

By adopting on 8 June 1977 the two Protocols additional to the 1949 Conventions, the States meeting in Geneva brought to a successful conclusion four years of arduous negotiations. The Protocols took four years, the Conventions only four months. Why such a huge difference?

In 1949, once the initial period of instinctive rejection of anything related to war had passed, a natural consensus emerged regarding the main evils which needed to be banned by law. Besides, the delicate subject of the rules governing the conduct of hostilities — the law of The Hague, as it is called, also part of humanitarian law — was left out of the discussions. It was also a time when the political map of the world was fairly monolithic, in the sense that the North still dominated the South, and East-West tensions had not yet escalated.

The idea of the Protocols was launched in a very different environment. The Third World had risen against the existing order, the decolonization process was well under way. The "capitalist" and "socialist" blocs were at each other's throats. One instance was the painful war in Vietnam, both from the political point of view and as regards the atrocities that took place (especially mass bombardments, torture and summary executions). This ideological and political confrontation could also be seen in the clash between the defence of individual interests and those of the collectivity.

It is then easier to understand why the 1974-1977 Diplomatic Conference was so lengthy and laborious; also that it was a time of intense military, humanitarian, political and legal negotiation. We thus share Geoffrey Best's opinion that "all law-making is at some level a political process" [1]. It is all the more political when it comes to drafting universal treaty law on matters dealing with war.

In view of the overall context at the time and of the issues and challenges that had to be addressed, the outcome merits unreserved praise. It was inevitably a compromise, however, and therefore could not satisfy each and every participating State equally in all respects.

Strengths and weaknesses

What was done to meet the needs left unfulfilled by the 1949 treaties, to respond to the new ways of conducting hostilities and to the consequences in humanitarian terms of civil wars and wars of



national liberation? The answer came in the form of two treaties of unequal length — 102 articles in one and 28 in the other — but of comparable humanitarian scope: the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); two treaties which do not invalidate the 1949 Conventions, but supplement them by strengthening existing rules and introducing new protective provisions. Above all, the Protocols added a whole set of rules relating to the conduct of hostilities and behaviour in combat, which had remained untouched since the Hague Conventions of 1907.

When the idea of the Protocols was first put forward, the ICRC advocated a parallel approach to the rules governing internal and international conflicts [2]. But its hopes were dashed already at the first Preparatory Conference of Governmental Experts of 1971 [3]. The participants were not prepared to extend to rebel forces the same rights and obligations as those accorded to the regular forces of enemy States.

On the other hand, the newly independent countries pulled out all the stops in order to have it agreed that when it came to the applicability of humanitarian treaties, armed national liberation movements should be treated just like regular armed forces. Whence the much-debated content of Article 1, paras 3 and 4, of Protocol I [4]. This was also one of the main reasons for the drastic "scissoring" of Protocol II at the end of the negotiations phase. Once the problem of national liberation wars had been settled, there were not many voices left in favour of a full, coherent set of rules applicable to civil wars. This is undoubtedly a weakness, but fortunately it does not leave the victim bereft of protection under the law.

Protocol I breaks new ground

Let us look at the main innovatory features of Protocol I.

Special protection was extended to cover civilian medical personnel, transport and units, which represents a considerable improvement in medical assistance to victims. This is a good illustration of the significant breakthrough made by the Protocol, since it broadens the generic category of objects and persons protected by the 1864 Geneva Convention. In addition, the means of identification of medical transports (radio signals, radar, acoustic, etc.) were adapted to modern technology.

The second major innovation — and one of the most controversial — was the change in the conditions conferring combatant status, and consequently prisoner-of-war status in the event of capture. In order to take account of the specific circumstances prevailing in wars of national liberation, the wearing of the uniform at all times was no longer mandatory [5]. This was seen by some as a realistic and necessary measure, and by others as a regrettable blurring of the distinction between civilians and combatants. We feel that both opinions have merit, since there is undeniably a grey area, and hence a heightened risk of both blunders and abuse. There are three ways of limiting this risk:

— by applying strictly the other conditions required for combatant status, in particular the obligation to carry arms openly in an attack;

— by reaffirming and requiring respect for the rules of conduct in combat, and in particular precautionary measures;



— by constantly promoting the ethic underlying the principle of distinction so that, as Jean de Preux has rightly pointed out, the belligerents come to understand that "by protecting the civilian populations they protect themselves". [6]

But the major breakthrough of Protocol I was the substantial progress achieved in the rules relating to the conduct of hostilities, the authorized methods and means of warfare and the protection of the civilian population. [7]

The three basic rules governing the conduct of hostilities were very clearly expressed and incorporated within a single, general text of law:

1. "[T]he right of the Parties to the conflict to choose methods or means of warfare is not unlimited." (Article 35, para. 1)
2. "It is prohibited to employ weapons (...) and methods of warfare of a nature to cause superfluous injury." (Article 35, para. 2)
3. Civilians and civilian objects must not be the target of attack (Articles 48, 50 and 52); these articles set out the principle of the distinction between civilians and combatants and between civilian objects and military objectives.

In addition to these three rules we should mention precautionary measures, obligatory both in attack and in defence (Articles 57 and 58 respectively). These key rules are accompanied by detailed rules of application.

All of the above adds up to one of the three major developments in the rules of international humanitarian law since the Second World War, the other two being the Fourth Convention of 1949 relative to the protection of civilian persons in times of war, and the adoption of treaty-based rules applicable to civil wars (i.e., Article 3 common to the 1949 Conventions; Protocol II).

In this connection, two other developments should be mentioned. The first is the obligation to determine whether the use of a new weapon being developed or adopted would be prohibited by humanitarian law (Article 36: "New weapons"). The second is the introduction in international humanitarian law of the institution of "civil defence", a practical tool intended to protect and assist the civilian population; its scope and characteristics are defined in Articles 61 to 67. Twenty years after the adoption of the Protocols, it must be acknowledged that national "civil defence" systems have achieved mixed results, however, which means that the role and future development of civil defence should perhaps be reassessed.

The last major category of innovations contained in Protocol I concerns monitoring and implementation mechanisms. International humanitarian law is often criticized for its lack of muscle when it comes to mechanisms intended to ensure or even impose respect for its rules, and the criticism is justified. It illustrates the fact that this law, adherence to which is partly voluntary, can only have the means of implementation that the States are willing to give it. So long as the international community is made up of very independent members, loath to accept external constraints, implementation mechanisms are bound to be imperfect. This does not mean that progress is impossible or that the legitimate pressure of domestic and international "civil society" should not be maintained or even stepped up, as was the case in 1977. Some advances have in fact been made since then.

Implementation mechanisms



First of all, we have in mind Article 7 of Protocol I, which provides for meetings of the High Contracting Parties to consider problems concerning the application of the Conventions and of the Protocol. It was pursuant to this provision that Switzerland, the depositary of the Conventions and the Protocols, convened an International Conference for the Protection of War Victims, held in Geneva from 30 August to 1 September 1993. That extraordinary meeting, replacing in part the International Conference of the Red Cross and Red Crescent, which had been unable to meet since 1986 [8], provided an opportunity to tackle the main implementation problems of the moment and to propose remedies. [9]

Another point is the greater degree of responsibility assigned to commanders. Under Article 87, commanders are required "to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol". This is a just and heavy responsibility, but one which is not sufficiently well known and is therefore neither duly observed nor complied with.

Article 90 of Protocol I brings a new control mechanism to international humanitarian law: the International Fact-Finding Commission. The 1949 Conventions did include the idea of an enquiry, but it was never put into effect. The Fact-Finding Commission constitutes an effort to remedy the shortcomings of the Conventions system, making it mandatory in particular to accept an enquiry concerning any allegation of a serious violation of international humanitarian law. This is a new and powerful means of imposing respect for international humanitarian law. It still has two weaknesses, however: first, a State is not bound by simply acceding to the Protocol, it has to make a declaration specifically accepting the Commission's competence. By 31 October 1997, out of 148 States party to Protocol I, only 50 had made such a declaration. This is why a major promotion effort still needs to be made. The other weakness concerns its material competence, for the Commission is empowered to enquire only into situations falling within the scope of Protocol I, that is international armed conflicts. Yet most of the tragedies of recent times have taken place in the course of civil wars or hybrid situations of violence. Therefore, an effort should now be made to extend the Commission's field of competence.

The fourth and last development we would like to highlight is the extension of acts qualified as grave breaches or war crimes, defined in Articles 11 and 85 of Protocol I. These new war crimes include:

- attacks on the civilian population or on individual civilians;
- attacks against works or installations containing dangerous forces (such as nuclear plants);
- forced deportations or transfers of population;
- attacks against monuments constituting the cultural or spiritual heritage of peoples;
- denial of the right to a fair and regular trial.

The acts thus designated by the Protocols, together with the serious breaches listed in the Conventions, constitute an appropriate penal response to the most reprehensible acts committed in wartime.

And yet few criminals are ever prosecuted and convicted. This is first of all because States do not respect their obligation under the Conventions and the Protocol to search for all persons guilty of



war crimes and to bring them before the competent national courts [10]. Second, under treaty law the acts concerned constitute war crimes only if they were perpetrated in situations of international armed conflict or those qualified as such. This is a serious handicap, given the nature of present-day conflicts in which the worst atrocities are being committed.

Nevertheless, both law and practice are moving towards qualifying all these acts as war crimes, whatever the nature of the armed conflict. A significant step forward in this regard is the Tadic decision of the International Tribunal for the Former Yugoslavia [11]. A similar trend may also be perceived in the work of the Preparatory Committee on the establishment of an international criminal court. It is crucial that this tendency be confirmed. The opposite would be a serious setback for the efforts aimed at strengthening the implementation mechanisms of international humanitarian law and a bad portent for much-needed developments in other areas of international humanitarian law.

Protocol II: the first treaty relating to civil wars

The first thing to say about Protocol II is that at least it exists. This is not at all meant to be a disparaging statement. Indeed, it was far from easy to adopt the first-ever universal treaty devoted exclusively to the protection of the individual and restriction on the use of force in civil wars or non-international armed conflicts. In this sense, Protocol II is a remarkable complement to Article 3 common to the four Conventions, which was until then the only provision applicable to such situations.

There is a reverse side to the coin, however: in order to pass the consensus test, the draft submitted to the negotiators had to suffer a number of cuts and deletions [12]. Although the issue of a privileged status for combatants had been disposed of at an earlier stage of the proceedings, the rules on the conduct of hostilities, assistance, medical missions and implementation mechanisms were dropped only during the last diplomatic round.

Nevertheless, even after those cuts Protocol II represents a new milestone in the protection of victims of civil wars. For instance, there is the detailed enumeration of fundamental guarantees (Article 4), of the rights of persons whose liberty has been restricted (Article 5) and of judicial guarantees (Article 6), which all go far beyond those contained in the "hard core" of human rights law. [13]

While it is true that the chapter on the conduct of hostilities was radically curtailed, the principle of prohibiting attacks against the civilian population was fortunately retained (Article 13). It is a considerable improvement on common Article 3 which did not — or at least not explicitly — protect civilians against the effects of hostilities. In addition to that basic rule, we might also mention the crucial new rules on the "Protection of objects indispensable to the survival of the civilian population" (Article 14) and the "Prohibition of forced movement of civilians" (Article 17).

Global assessment

As far as the substantive rules of conduct are concerned, the overall result is therefore very satisfactory. The value of the Protocols also resides in their multicultural backdrop; indeed, all of the world's main powers took part in drafting the texts. The adoption of the Protocols drew the curtain on a whole chapter of international humanitarian law which had in the past often come under attack as being too Western-oriented.

The assessment is less favourable, however, where the monitoring and implementation



mechanisms are concerned. This demonstrates the lack of sufficient will on the part of States to respect and to do everything to "ensure respect for" international humanitarian law.

Another criticism often levelled at these texts is that they are very complicated, sometimes excessively so. This may be a slight drawback, but it does not amount to a real weakness, for no one expects officers or soldiers to move around the battle zone carrying a copy of the Protocols. As General A.P.V. Rogers recently wrote quite rightly: "Protocol I cannot stand by itself as a document issued to military personnel. It has to be incorporated into military manuals with explanatory commentaries, cross-references and practical guidance, but it does form the foundation of those manuals".[14]

Lastly, in our view the main contribution of the Protocols is the clear reaffirmation of the three basic functional principles of international humanitarian law, applicable in all situations of armed conflict. [15]

— Humanity: non-combatants enjoy general protection against the effects of hostilities; they must be respected, protected and treated humanely.

— Military necessity: military personnel and objects may be attacked, but the injury and damage inflicted must be as limited as possible.

— Proportionality: when protection is not absolute, the requirements of "humanity" and "military necessity" [16] should be weighed against each other in good faith.

Advancing towards universality

What the state of participation tells us

As at 31 October 1997, 148 States were party to Protocol I and 140 to Protocol II; this puts the Protocols among the most widely accepted legal instruments, though still quite far behind the 1949 Conventions, which are practically universal (188 States Parties). But given that nearly three-quarters of the States making up the international community have adhered to the Protocols, any fundamental reconsideration of the treaties is no longer conceivable.

In order to see what lessons may be drawn from the state of participation, let us look at the facts and figures more closely. What does the world map of the Protocols tell us?

Africa: one of the top two continents where participation is concerned, though there are a few notable absentees, namely Ethiopia, Somalia and Sudan. Two countries recently involved in civil wars — Angola and Mozambique — have not yet acceded to Protocol II.

The Americas: the continent of extremes. The South has accepted the Protocols completely, while the North features a major absentee — the United States — and one participating State, Canada.

Asia and Oceania: this is the region with the highest number of non-participating countries, with some encouraging exceptions such as Australia, China and Vietnam (Protocol I only).

Europe: very satisfactory on the whole, though with three major absentees — the United Kingdom, France (party to Protocol II) and Turkey.



Middle East and North Africa: participation in Protocol I is generally satisfactory, despite four important exceptions — Iran, Iraq, Israel and Morocco; several other countries are not party to Protocol II.

The above picture prompts three observations.

First, there is a group of non-participating countries which are currently or were recently involved in an active or latent armed conflict.

Second, the major and medium-sized powers which have not yet acceded to the treaties do not have or no longer have any declared reservations regarding the substance of the texts. Their reasons therefore lie outside international humanitarian law itself. Do they relate to any political or strategic considerations, or is it more a matter of bureaucratic inertia or low ranking on the scale of priorities?

Third, should Asia's poor record be ascribed to the attitude of the powers from other continents, or is it due to an endemic distrust of all universal treaties?

Despite constant reminders in legal texts and in the treaties themselves that international humanitarian law does not "create" armed conflict and that it has no effect on the belligerents' legal status, it is clear that many countries that find themselves close to ongoing conflicts or involved in them are reluctant to adhere to the Protocols because of such fears. The community of States Parties should make a much greater effort to counter these interpretations by taking every available opportunity to specify the exact role and true scope of international humanitarian law.

There is a second, more disturbing interpretation regarding the first group of countries, namely that some of them are staying away to avoid being bound by certain humanitarian obligations, or even to be in a position to invoke them as and when they please, or else to use them as bargaining counters. Such arguments should be abandoned once and for all.

The world's great powers undeniably bear a heavy responsibility in this connection. As leaders, they send out signals which are followed by the smaller countries. A strenuous promotion effort should therefore be undertaken by all those who share the belief that the victims of armed conflicts would enjoy better protection if the Protocols enjoyed undisputed universal recognition, without any ambiguities or insinuations. As for any remaining substantive objections, most of these could probably be dealt with by issuing interpretative declarations or reservations.

Law and practice

Despite the various obstacles encountered during the four years of negotiations, at the end of the Diplomatic Conference there was little criticism of the Protocols. Most observers described the texts as positive and realistic. This opinion was even shared by most of those who in the United States some few years later came out against the Protocols, at times vehemently. [17]

The great period of criticism, especially French and American, reached its peak in 1987, when President Reagan recommended that the Senate ratify Protocol II, but not Protocol I.¹⁸ True, military experts had drawn up a list of practical and editorial shortcomings, which in their view were as many arguments against ratification. Apart from the sensitive issue of the ban on reprisals, however, the weightiest arguments were mainly of a political and ideological nature.



This was true in particular of the claim that incorporating wars of national liberation would legitimize foreign intervention and politicize international humanitarian law, or that granting recognition to guerrilla forces would open the door to terrorism [19]. France's main objection turned out to be the issue of the use of nuclear weapons, as it made clear in a statement sent to the depositary on the occasion of the ratification of Protocol II in 1984. [20]

At the end of the 1980s, the tide began to turn. This was mainly due to the following three reasons: the gradual decline and subsequent fall of the socialist bloc; requirements and practice in operational zones, particularly during the Gulf war, in Somalia and in the former Yugoslavia; and the rapprochement between Arab countries and Israel. Once those political and strategic obstacles had been removed completely or in part, the real nature and value of the Protocols re-emerged.

Meanwhile, the general staff and legal experts of the main Western armies — in Germany, the United States and the United Kingdom in particular — had, both individually and within the framework of NATO, re-examined the content of the Protocols clause by clause in order to redefine their soundness, their usefulness, the appropriate interpretations or reservations and/or their customary nature.

This paved the way for Germany's ratification of the Protocols in 1991 and the publication of a military manual adapted accordingly [21], for the incorporation of most of the clauses in instructions for the United States armed forces [22] and the 1995 approval of the Protocols by the government and Parliament of the United Kingdom [23].

The ICRC's action

In its capacity (conferred upon it by the States) as the institution responsible for promoting and implementing international humanitarian law [24], in recent years the ICRC recalled the main rules of the law and called for their observance whenever a serious internal or international armed conflict broke out. On no occasion did the belligerents refuse to be bound by certain rules invoked by the ICRC, even if they were not party to the Protocols. This tends to confirm that the main rules of the Protocols have acquired a binding force that transcends the texts themselves.

To illustrate this, we think it useful to comment on the following three situations:

- the Gulf war: an international armed conflict;
- conflicts in the former Yugoslavia: mixed conflicts;
- the Angolan conflict: non-international armed conflict.

The main protagonists of the Gulf war, in particular Iraq, the United States, France and the United Kingdom, were not party to Protocol I. In view of this, and in order to ensure a common understanding of and respect for the essential rules applicable to the conflict, on 14 December 1990 the ICRC sent a memorandum to all the parties involved. Apart from the provisions regarding the protection of civilians and persons *hors de combat*, the ICRC highlighted the pertinent rules of Protocol I relating to the conduct of hostilities, referring to them as "general rules (...) recognized as binding on any party to an armed conflict". [25]

In the case of the *conflicts in the former Yugoslavia*, in the initial stages the ICRC played a very active role in order to establish with the belligerents the body of rules applicable to the different



conflictual relations. This was necessary since, although Yugoslavia had been bound by the Protocols since 1979, there was some uncertainty regarding succession to the treaties by the new emerging States and the internal or international nature of the conflicts. It was therefore important to define a "hard core" of rules acceptable to all.

This led to an agreement between the representatives of Croatia and SFRY, signed on 27 November 1991 [26], in which reference was made to all four Conventions and to Protocol I. With regard to the latter, specific references were made to provisions on the treatment of persons in the power of a party to the conflict (Articles 72-79), on methods and means of warfare (Articles 35-42), and on the protection of the civilian population (Articles 48-58). Although many of these rules were violated in the course of the conflict, their applicability was never contested by the parties.

The ICRC has been present in *Angola* almost uninterruptedly since the country became independent in 1975. The hostilities taking place there clearly constituted a non-international armed conflict, to which an international dimension was added through the actions of third powers. The provision of international humanitarian law applicable to the relation between government and UNITA forces was therefore Article 3 common to the Conventions, and customary rules relating to civil wars. In the last phase of hostilities, the ICRC thought it useful to remind the parties of the humanitarian rules they should observe (memorandum of 8 June 1994). [27]

This text is remarkable in that, referring to no other treaties than the Geneva Conventions and their common Article 3, it provides a fairly complete list of customary rules derived from the Protocols and applicable to non-international armed conflicts. We are thinking in particular of:

- the prohibition on children under 15 from taking part in combat;
- the prohibition of attacks against civilian persons and objects;
- the prohibition of indiscriminate attacks or attacks causing excessive civilian damage;
- the prohibition on destroying supplies essential to the survival of the civilian population;
- precautions in attack and defense.

It is interesting to note that these rules of conduct, which the ICRC regards as customary, had already been interpreted as such in the San Remo Declaration of 7 April 1990. [28]

Steady progress

The high number of States which have accepted Protocol I and, to a lesser extent, Protocol II, as well as the undeniable influence which some of their rules have exerted and will continue to exert on the conduct of non-participating States, clearly show that today the essence of these treaties reflects the state of universal customary law. Since there are only a few treaty-based rules applicable to internal conflicts, customary rules cannot be determined by direct reference to pertinent legal provisions. Instead, they must be inferred from a teleological interpretation of general rules and principles and by reference to treaty rules applicable to international armed conflicts. This reveals both the usefulness and the intrinsic precariousness of customary rules [29]. This factor of instability is obvious in the case of law applicable to civil wars, but it is also apparent, though to a lesser degree, when it comes to humanitarian law governing international conflicts.

One of the arguments quite justifiably put forward by certain analysts, concerned that the United



States has not ratified Protocol I, is that there is a risk of seeing the establishment of a form of "American" customary law, somewhat different from the treaty-based law adhered to by most of the international community. On the other hand, these authors go on to say, if the United States acceded to the Protocol, it would be able to make whatever interpretative declarations and reservations it considered necessary. In view of the country's weight on the international scene, these would be instrumental in shaping customary rules for the universal application of treaty-based norms within a single coherent framework, that of the Protocol [30]. Theodor Meron goes even further when he says that "by remaining aloof, the United States may be abdicating its historical leadership in the shaping of the law of war" [31]. His remarks about the United States appear to us equally relevant with regard to some other non-participating powers. These include the United Kingdom, of course, which we hope will soon be depositing instruments of ratification, and especially the major Asian countries, such as India, Indonesia and Japan. If international humanitarian law is to achieve a greater degree of stability and universality, a commitment on their part to the Protocols is a must.

Twenty years on, the Protocols are doing well. They are undoubtedly part of the general positive law; the gist of their rules was put into practice, for instance, by the coalition members during the Gulf war. They are still not universal, however, which is essential if this area of law, which governs a sizeable part of international relations in periods of crisis, is to enjoy full credit and authority.

Looking beyond the Protocols

Most scholars engaged in analysing present-day conflicts or endeavouring to curtail their harmful effects are of the opinion that the rules on conduct and protection as expressed in the basic treaties of international humanitarian law, namely the 1949 Geneva Conventions and the 1977 Additional Protocols, meet the basic needs of individuals and peoples caught up in the maelstrom of today's wars. We believe that these rules will be just as pertinent in the wars of tomorrow, since the fundamental values which need to be safeguarded are timeless.

Why is it then that, despite the existence of appropriate rules, the sum of unbearable suffering is not decreasing? To a large extent, the answer lies in the changing nature and context of armed conflicts.

Contemporary conflicts reflect less and less the traditional objectives of warfare, namely the struggle for political power or territorial conquest. The main causes of violence encountered today are: the weakening of authority and of the State, economic hardship, and the assertion of ethnic identity. Oscillating between the absence of ethics, the disappearance of traditional values and the rise of an ethic of exclusion, these situations are often in themselves a negation of the law. Even international humanitarian law has very little, or no place there at all.

But the fault does not lie with international humanitarian law. The real problem is rather one of a "missing link", namely some connection between the law and the moral values of the group concerned. In this respect we agree with Alain Papaux and Alain Wyler, for whom the acceptance of a solution indispensable to the stability of a social group depends on it becoming part of the prevailing ethic [32]. Therefore, from now on this should be the main focus of the efforts of all those working for the application of and respect for international humanitarian law. In practical terms, this would entail:

— redefining or reasserting and upholding the moral standards of communities that are adrift;



- finding the right channels of communication and influencing the perpetrators of the new forms of violence;
- putting across the universal values enshrined in international humanitarian law in a way that can be understood by those groups or communities;
- educating or re-educating those concerned.

We would like to believe that violence is not inevitable and that, even if it were, it may be mastered and controlled. This requires an enormous effort of awareness-raising and education, to which the International Red Cross and Red Crescent Movement, and the National Societies in particular, can and should make a greater contribution. This was the message of the main resolutions adopted by the latest International Conference of the Red Cross and Red Crescent, held in 1995. [33]

These measures do not require any changes in the law, they go hand in hand with it.

It must be recognized, however, that the existing definitions of the traditional subjects of international humanitarian law, namely authorities and individuals, and the implementing mechanisms offered by international treaties and institutions are no longer appropriate when it comes to the protagonists of new types of conflict — especially unstructured groups — or to the new power bases represented by private economic and financial giants.

Similarly, the field of application of humanitarian treaties is too restrictive to encompass all situations of armed violence. The protection of the individual under international law is therefore uneven and depends on the nature of the violent act concerned.

This brings us to our final remarks and our proposals for action.

The two Protocols of 1977 are an essential complement to the 1949 Conventions. Nowadays, the rules of Geneva and those of The Hague make up an indissociable whole. The essence of these treaties provides an adequate basis for the protection of human beings in time of war. We therefore need to ensure that the Protocols attain the same degree of universality as that enjoyed by the Conventions. If we hope to reach the new perpetrators of violence, one precondition is that all the traditional partners, especially the major States, should at least have made the same p r o f e s s i o n o f f a i t h .

Together, the Conventions and the Protocols make up a consistent set of rules of conduct. In the last 20 years, partly owing to the growing number of States party to the Protocols, and partly owing to the application of their content by States which are not party to them, a body of universal customary rules has emerged, reflecting the treaty-based norms. This customary law offers a measure of security in situations where the treaties do not formally apply [34]. Thanks to the Protocols, the fundamental principles have been reaffirmed and crystallized. They constitute an intangible basis for the protection of the individual whenever armed force is used.

The gains achieved by the Protocols provide a starting point for further developments in areas where they are still required, such as situations of violence which are not covered by international humanitarian law, implementation mechanisms, or applicability of the law to the new protagonists.

It is true that international humanitarian law, and more particularly the Protocols, did not prevent the massacres in Rwanda or in the former Yugoslavia, in Liberia or Chechnya. But, to paraphrase Geoffrey Best [35], these dramatic cases reflect not so much the failure of international humanitarian law as the failure of civilization. The message of international humanitarian law as



developed by the Protocols is that warfare can and must be brought under control.



SUPPLEMENTARY READING 8

Penal Repression: Punishing War Crimes

International Committee of the Red Cross

International humanitarian law sets out detailed rules aimed at protecting the victims of armed conflict and restricting the means and methods of warfare. It also establishes mechanisms to ensure that these rules are respected. In particular, humanitarian law holds individuals responsible for violations of humanitarian law which they commit, or order others to commit. It requires that those responsible for serious violations should be prosecuted and punished as criminals. The most serious violations of humanitarian law are termed war crimes.

War Crimes and the Geneva Conventions

Many of the rules relating to international armed conflict are set out in the four Geneva Conventions of 1949 and the first Additional Protocol of 1977. States are obliged to suppress all violations of these instruments. There are however specific obligations relating to certain serious violations called grave breaches.

Grave breaches represent some of the most serious violations of international humanitarian law. They are specific acts listed in the Geneva Conventions and Protocol I, including wilful killing, torture or inhuman treatment, and willfully causing great injury. A full list of grave breaches is set out in the attached table. Grave breaches are regarded as war crimes.

Grave Breaches must be punished

The Conventions and Protocol make clear that grave breaches must be punished. However they do not themselves set out specific penalties nor do they create a tribunal to try offenders. Instead they expressly require States to enact criminal legislation to punish those responsible for grave breaches. States are also required to search for persons accused of grave breaches, and either to bring them before their own courts or to hand them over for trial in another State.

In general, a State's criminal law only applies to acts committed within its territory or by its own nationals. However international humanitarian law goes further. It requires States to search for and punish all those who have committed grave breaches regardless of the nationality of the perpetrator or where the crime was committed. This principle, called universal jurisdiction, is a key element in ensuring the effective repression of grave breaches.

International humanitarian law requires State to take the following specific action in relation to grave breaches:

- First, a State must enact national legislation prohibiting and punishing grave breaches - either adopting a separate law or by amending existing laws. Such legislation must cover all persons, regardless of nationality, committing grave breaches or ordering them to be committed and including instances where violations result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the State.



- Second, a State must search for and prosecute those alleged to be responsible for grave breaches. It must prosecute such persons or extradite them for trial in another State;
- Third, a State must require its military commanders to prevent, suppress, and take action against those under their control who commit grave breaches;
- Fourth, States should assist each other in connection with criminal proceedings relating to grave breaches. States are required to fulfil these obligations in times of peace as much as in time of armed conflict. In order to be effective the above measures must be adopted before grave breaches have the opportunity to occur.

All Violations of Humanitarian Law must be suppressed

States must ensure compliance with all provisions of humanitarian law including those applicable to non-international armed conflict and those regulating the use of weapons. For example, the Mines Protocol to the 1980 Conventional Weapons Convention requires States to impose penal sanctions against those killing or injuring civilians in violation of the Protocol. States must ensure compliance with rules arising under customary international law, as well as those set out in international agreements.

States must take whatever measures are necessary to prevent and suppress all violations thereof. Such measures may include military regulations, administrative orders and other regulatory measures. However criminal legislation is the most appropriate and effective means of dealing with all serious violations of international humanitarian law. A number of States have already enacted criminal law to punish violations of the provisions of Common Article 3 of the Geneva Conventions and Additional Protocol II which apply to non-international armed conflict.

International and National Tribunals

The United Nations Security Council has established two tribunals to try certain crimes committed within the former Yugoslavia and in relation to events in Rwanda, including violations of international humanitarian law. There are also on-going discussions concerning the establishment of a Permanent International Criminal Court which would also have the power to try serious violations of international humanitarian law.

These developments are a welcome support to attempts to prevent and punish violations of humanitarian law. However international tribunals are unlikely ever to be able to replace entirely the role of national courts and the need for effective national criminal legislation. States continue to bear the primary obligation to ensure respect for humanitarian law, and to prevent and punish violation of that law. Only by effective action at the national level can full respect for humanitarian law be ensured.





SUPPLEMENTARY READING 9

Women 2000

*Sexual Violence and Armed Conflict:
United Nations Response
Division for the Advancement of Women*

Introduction

Sexual violence during armed conflict is not a new phenomenon. It has existed for as long as there has been conflict. In her 1975 book *Against Our Will: Men, Women and Rape*, Susan Brownmiller presented stark accounts of rape and other sexual atrocities that have been committed during armed conflict throughout history. While historically very few measures have been taken to address sexual violence against women committed during armed conflict, it is not true to say that there has always been complete silence about the issue. Belligerents have often capitalized upon the abuse of their women to garner sympathy and support for their side, and to strengthen their resolve against the enemy. Usually, the apparent concern for these women vanishes when the propaganda value of their suffering diminishes, and they are left without any prospect of redress. It is true to say that the international community has, for a long time, failed to demonstrate a clear desire to do something about the problem of sexual violence during armed conflict. The turning point came in the early 1990s as a result of sexual atrocities committed during the conflict in the former Yugoslavia, and it seems that finally, the issue has emerged as a serious agenda item of the international community.

Towards the end of 1992, the world was stunned by reports of sexual atrocities committed during the armed conflict in the former Yugoslavia. Newspaper headlines decried: "Serbian rape camps: Evil Upon Evil" and "Serben vergewaltigen auf obersten Befehl" (Serbs rape on highest orders)¹. The media reported that rape and other sexual atrocities were a deliberate and systematic part of the Bosnian Serb campaign for victory in the war. A perception was generated that detention camps had been set up specifically for the purpose of raping women, and that the policy of rape had been planned at the highest levels of the Bosnian Serb military structure. Strong and persistent demands for a decisive response to these outrages came from around the globe.

Many of the steps taken to address sexual violence against women during armed conflict have occurred within the framework of the United Nations. This issue of women 2000 focuses upon some of these developments. Two points must be made at the outset. First, sexual violence during armed conflict affects men as well as women. However, it is clear that women are more likely to be subjected to sexual violence than men. Women are also targeted for different reasons than men, and they are affected by the experience in very different ways to men. For a woman, there is the added risk of pregnancy as a result of rape. In addition, women occupy very different positions in society to men, and are treated differently as a result of what has happened to them. Women are frequently shunned, ostracized, and considered unmarriageable. Permanent damage to the reproductive system, which often results from sexual violence, has different implications for women than for men. Thus, while it is imperative to acknowledge and redress the trauma suffered by both men and women, it is important to recognize their different experiences when responding to the problem. Secondly, it must be emphasized that sexual violence is only one of the issues that arise when considering women's experience of armed conflict. For example, more women than men become refugees or displaced persons during conflict, and women's primary responsibility for agriculture and water collection in many societies renders them particularly



vulnerable to injury from certain types of weapons used in conflict, such as land-mines. Further, women's overall position of disadvantage within the community means that the general hardships accompanying armed conflict frequently fall more heavily upon women than upon men. Women who serve as combatants experience armed conflict differently to male combatants, and the culture of militarism impacts upon women in particular ways.² Although not within the scope of the present issue, the many other ways that armed conflict affects women warrant serious attention and concern.

In the first part of this issue, consideration is given to the failure of the international community to address the issue of war-time sexual violence during the early years of the UN. Developments are traced to the early 1990s when the international community finally recognized that human rights violations committed against women during armed conflict, including sexual violence, violate fundamental principles of international human rights and humanitarian law. In the second part of this issue, the manner in which sexual violence during armed conflict emerged as an item of serious concern within the UN is examined. The role of women's NGOs in exerting pressure for change is highlighted, and the UN's response described. The concluding section examines how the issue may be advanced in the next century.

Sexual Violence During Armed Conflict: A Hidden Atrocity?

The Nature of Sexual Violence During Armed Conflict

The term "sexual violence" refers to many different crimes including rape, sexual mutilation, sexual humiliation, forced prostitution, and forced pregnancy. These crimes are motivated by a myriad of factors. For example, a commonly held view throughout history has been that women are part of the "spoils" of war to which soldiers are entitled. Deeply entrenched in this notion is the idea that women are property -- chattel available to victorious warriors. Sexual violence may also be looked upon as a means of troop mollification. This is particularly the case where women are forced into military sexual slavery. Another reason that sexual violence occurs is to destroy male, and thereby community, pride. Men who have failed to "protect their women" are considered to be humiliated and weak. It can also be used as a form of punishment, particularly where women are politically active, or are associated with others who are politically active. Sexual violence can further be used as a means of inflicting terror upon the population at large. It can shatter communities and drive people out of their homes. Sexual violence can also be part of a genocidal strategy. It can inflict life-threatening bodily and mental harm, and form part of the conditions imposed to bring about the ultimate destruction of an entire group of people.

Sexual Violence and World War II

Historical records are largely silent about the occurrence of sexual violence during World War II. This is not because sexual violence did not occur, but for a variety of other reasons. Part of the problem is that sexual violence was perpetrated by all sides to the conflict. Consequently, it was difficult for one party to make allegations against the other at the conclusion of hostilities. Moreover, sexual violence had long been accepted as an inevitable, albeit unfortunate, reality of armed conflict. This was compounded by the fact that in the late 1940s sexual matters were not discussed easily or openly, and there was no strong, mobilized women's movement to exert pressure for redress.

Only in recent years have writers and others begun to reconsider the issue of sexual violence during World War II. At the centre of this has been the belated recognition of crimes committed against many thousands of Asian women and girls who were forced into military sexual slavery by the Japanese Army during World War II. They have become known as "comfort women". In 1992,



the Japanese Government officially apologized for compelling these women into military sexual slavery, and has written to each surviving "comfort woman". The UN's Special Rapporteur on violence against women has reported that these women and girls endured: "...memorable experiences are when I speak to victims, especially when I spoke to the comfort women in Korea. I don't think I have ever heard such horrendous tales...[Special Rapporteurs] are not supposed to cry, but it is terribly difficult." Radhika Coomaraswamy, Special Rapporteur on violence against women, Interview in Libertas, International Centre for Human Rights and Democratic Development, Dec 1997, Vol 7:2, p. 7."...multiple rape on an everyday basis in the 'military comfort houses'...Allegedly, soldiers were encouraged by their commanding officers to use the "comfort women" facilities rather than civilian brothels 'for the purpose of stabilizing soldiers' psychology, encouraging their spirit and protecting them from venereal infections', as well as a measure to prevent looting and widespread raping during military attacks on villages."³ The Special Rapporteur has stated that the tales of the "comfort women" are amongst the most horrendous she has ever heard. Yet the stories of these women remained buried for nearly 50 years.

Post-World War II War Crimes Trials

Following World War II, two multinational war-crimes tribunals were established by the Allies to prosecute suspected war criminals, one in Tokyo, and the other in Nuremberg. Despite the fact that rape and other forms of sexual violence had been prohibited by the laws of armed conflict for centuries, no reference was made to sexual violence in the Charters of either the Nuremberg or the Tokyo tribunals. Although some evidence of sexual atrocities was received by the Nuremberg Tribunal, sexual crimes committed against women were not expressly charged nor referred to in the Tribunal's Judgement. Indictments before the Tokyo Tribunal did expressly charge rape, evidence was received, and the Tokyo Judgement referred to rape. For example, evidence of rape during the Japanese occupation of Nanking was presented during the trial of General Matsui who had the command of Japanese forces there. Matsui was convicted of war-crimes and crimes against humanity based in part on evidence of rape committed by his troops. However, none of the women who had been raped were actually called to testify, and the subject of women's victimization was only given incidental attention.

Additional war crimes trials were held pursuant to Control Council Law No. 10, which was adopted by the Allies in 1945 to provide a basis for the trial of suspected Nazi war criminals who were not dealt with at Nuremberg. This document represented an advance over the Charters of the Nuremberg and Tokyo Tribunals in that rape was explicitly listed as one of the crimes over which the Control Council had jurisdiction. However, no charges of rape were actually brought pursuant to Control Council Law No.10.

Control Council Law No.10 Article II(1)(c) of, gave the Council jurisdiction over: "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." (emphasis added).

The Geneva Conventions and Additional Protocols

Although not a UN initiative, the four Geneva Conventions adopted in 1949 are relevant to the present discussion. Following the horrors of World War II, these Conventions were initiated by the International Committee of the Red Cross in order to improve the situation of war victims. In 1977 two Additional Protocols were adopted to extend and strengthen the protection provided in the Geneva Conventions. These treaties form part of the law of armed conflict, and contain certain provisions that apply specifically to women.



Many of these provisions seek to protect women in their capacity as expectant mothers, maternity cases and nursing mothers; others regulate the treatment of female prisoners. There are also provisions dealing explicitly with sexual violence.

Problems with provisions of the law of armed conflict that prohibit sexual violence

In the 1949 Geneva Conventions and Additional Protocol I, certain crimes are designated as "grave breaches". Classification of a particular crime as a grave breach is significant because States have a duty to search for persons who are alleged to have committed grave breaches and, if found within their territory, to bring them before their courts or alternatively to extradite them for prosecution. The effect of the grave breach system is to create a hierarchy, with some violations of the law of armed conflict considered more egregious than others. Sexual violence is not expressly designated as a grave breach, although the view that sexual violence fits within other categories of grave breaches, such as "wilfully causing great suffering or serious injury to body or health", and "torture or inhuman treatment", has gained acceptance. Nonetheless, the absence of express reference to sexual violence as a grave breach is a reflection of the international community's historical failure to appreciate the seriousness of sexual violence during armed conflict.

Another problem with provisions of the Geneva Conventions and Additional Protocols is that they characterize rape and other forms of sexual violence as attacks against the "honour" of women, or at most as an outrage upon personal dignity. The implication is that "honour" (or dignity) is something lent to women by men, and that a raped woman is thereby dishonoured. Failure of these instruments to categorize sexual violence as a violent crime that violates bodily integrity, presents a serious obstacle to addressing crimes of sexual violence against women. It directly reflects and reinforces the trivialization of such offences. In addition, as one writer has pointed out, the provisions are protective rather than prohibitive.⁴

The only requirement is for particular care to be taken, presumably by men, to protect women against sexual violence. Thus the provisions appear to be more about the role of the "male warrior" during armed conflict than about recognizing sexual violence as a violation of the rights of women and prohibiting it.

What is the "law of armed conflict"?

The body of international legal principles found in treaties and in the practice of States, that regulates hostilities in situations of armed conflict. "Armed conflict" is the preferred legal term rather than the term "war" because the law applies irrespective of whether there has been a formal declaration of war.

Other terms with the same meaning include: "international humanitarian law", "the humanitarian laws of war" and "jus in bello".

Different rules apply depending upon whether a conflict is internal (i.e. a civil war) or international (i.e. a war between two or more states or state-like entities). Internal conflicts are regulated by fewer laws than international conflicts.

Is the law of armed conflict different from international human rights law?

Yes, the law of armed conflict and international human rights law have historically developed as separate bodies of law, with the former directed at the alleviation of human suffering in times of armed conflict, and the latter directed at the alleviation of human suffering during times of peace. Since the establishment of the UN, there has been a tendency to regard the law of armed conflict as part of the broader international human rights law framework.

Does the law of armed conflict deal explicitly with sexual violence?

Yes, the relevant provisions are:



Geneva Convention IV Relative to the Protection of Civilian Persons; Article 27: "*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.*"

Additional Protocol I of 1977; Article 76(1): "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."

Additional Protocol II of 1977; Article 4(2)(e) prohibits:

"Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."

UN Responses to Sexual Violence

One of the first major references within the UN system to women and armed conflict was in 1969, when the Commission on the Status of Women, began to consider whether special protection should be accorded to particularly vulnerable groups, namely women and children, during armed conflict and emergency situations. Following this, the Economic and Social Council (ECOSOC) asked the UN General Assembly (GA) to adopt a declaration on the topic. The GA responded by adopting the Declaration on the Protection of Women and Children in Emergency and Armed Conflict in 1974. The Declaration recognizes the particular suffering of women and children during armed conflict. It emphasizes the important role that women play "in society, in the family and particularly in the upbringing of children", and the corresponding need to accord them special protection. It also urges States to comply with their obligations under international instruments, including the 1949 Geneva Conventions, that offer important guarantees of protection for women and children.⁵ There is no explicit reference to women's vulnerability to sexual violence during armed conflict. Yet, as the Special Rapporteur on violence against women has reported, there is evidence that in 1971, rape was committed on a massive scale during the conflict in Bangladesh.⁶ In light of this, the omission of any explicit reference to sexual violence in the Declaration just a few years later is notable. Clearly, at the time the Declaration was adopted, concern over the situation of women during armed conflict was closely connected with their role as mothers and care-givers, and very limited recognition was given to issues affecting women in their own right. However, the Declaration does make a general plea for compliance with the laws of armed conflict. The Fourth Geneva Convention of 1949 was in existence at the time and, as described above, this expressly addresses rape. The Declaration also stipulates that all necessary steps shall be taken to prohibit *inter alia* degrading treatment and violence, which may be considered to implicitly encompass sexual violence.⁴

Throughout the 1980s, the UN continued to refer to the particular vulnerability of women during armed conflict, but still without any explicit reference to the prevalence of sexual violence. The practice of considering women and children as one category demonstrated a continuing preoccupation with women as mothers and care-givers.

For example, commencing in the 1980s the ECOSOC agreed a series of resolutions on the situation of Palestinian women and children in the occupied Arab territories, as well as the situation of women and children in Namibia, and women and children living under apartheid. These resolutions recognized the poor living conditions of women but did not refer to their vulnerability to sexual violence. It seems unlikely that, in contrast to the majority of other conflicts throughout history, sexual violence was not a feature of these particular conflicts.

At the end-of-decade Conference held in Nairobi in 1985, the Forward-looking Strategies for the Advancement of Women, adopted to provide a blueprint for the advancement of women to the Year 2000, referred to the especially vulnerable situation of women affected by *inter alia* armed conflict, including the threat of physical abuse. The general vulnerability of women to sexual



abuse and rape in everyday life was recognized, but sexual violence was not specifically linked to armed conflict.⁸
Even in the mid-1980s, sexual violence during armed conflict largely remained unrecognized.

The 1990s: International Concern Over Sexual Violence During Armed Conflict

The Gulf War and the Creation of the United Nations Compensation Commission

Some of the first steps towards progress on the issue of wartime sexual violence taken by the UN have gone almost unnoticed. As in the case of other conflicts, when Iraq invaded Kuwait in 1990, sexual violence was a frequent occurrence during the ensuing hostilities. A UN report documented the prevalence of rape perpetrated against Kuwaiti women by Iraqi soldiers during the invasion.⁹

Although the UN Security Council did not expressly refer to sexual violence against women in its resolutions relating to the Gulf conflict, it did create the United Nations Compensation Commission (UNCC) to compensate victims who suffered damage as a result of Iraq's unlawful invasion of Kuwait. The UNCC is primarily funded by a 30 per cent levy on Iraq's annual oil exports. Initially, Iraq refused to resume oil exports under the conditions imposed by the UN, thereby crippling the capacity of the fund to operate as intended. However, in 1995, an agreement was reached known as the "oil for food" arrangement, and money has subsequently become available for the payment of claims. The UNCC determined that it would compensate "serious personal injury" which expressly includes physical or mental injury arising from sexual assault. Some claims asserting rape by members of the Iraqi military forces were filed with the UNCC, and guidelines were adopted to facilitate proof of these claims making it much easier for women to receive compensation. In one case, a woman claimed she had been subjected to sexual assault by Iraqi soldiers and suffered a miscarriage as a result. The woman requested that her name be withheld from her claim. The government filing the claim on her behalf could provide confirmation of her identity and, recognizing the difficulties faced by sexual assault victims, the Panel of Commissioners recommended compensation for her claim despite the absence of her name.¹⁰

The conflict in the Former Yugoslavia

It was not until sexual atrocities were committed during the conflict in the former Yugoslavia that consistent references began to appear throughout the UN to the problem of sexual violence during armed conflict. Security Council resolution 798 of 18 December 1992 referred to the "massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina". Similar resolutions followed. As part of its response to the conflict, the Security Council established a Commission of Experts (Yugoslav Commission), to investigate violations of international humanitarian law committed in the former Yugoslavia. In its Interim Report, the Yugoslav Commission listed systematic sexual assault as one of the priority areas in its ongoing investigations,¹¹ and it subsequently collected information regarding approximately 1,100 reported cases of sexual violence. Most of the cases had occurred in Bosnia and Herzegovina between April and November 1992. In its Final Report the Yugoslav Commission concluded that, although all sides to the conflict had perpetrated sexual violence, the vast majority of the victims were Bosnian Muslims, the vast majority of the perpetrators were Bosnian Serbs, and that Serbs reportedly ran over 60 per cent of the detention sites where sexual assault occurred. According to the Yugoslav Commission, there was strong, although not conclusive, evidence of a systematic pattern of sexual assault by the Bosnian Serbs.¹²



The UN Commission on Human Rights appointed Mr Tadeusz Mazowiecki as Special Rapporteur on the Situation of Human Rights in the Territory of the Former Yugoslavia. In January 1993, the Special Rapporteur dispatched an international team of medical experts to investigate rape,¹³ and in February 1993, he endorsed the team's findings that rape had been used as an instrument of ethnic cleansing in Bosnia- Herzegovina and Croatia, and that persons in positions of power appeared to have made no effort to prevent these abuses.¹⁴

The ad hoc war crimes tribunal for the former Yugoslavia

In 1993, the Security Council created an ad hoc war crimes tribunal (Yugoslav Tribunal) to prosecute persons suspected of having committed violations of international humanitarian law during the war in the former Yugoslavia. The Yugoslav Tribunal is a subsidiary body of the Security Council, and is located in The Hague, The Netherlands. At the time of its creation, it was clearly envisaged that the Yugoslav Tribunal would prosecute crimes of sexual violence, and this is reflected in the governing statute of the Tribunal, which expressly refers to rape as constituting a crime against humanity.

"From multiple testimony and the witness statements submitted by the Prosecutor to this Trial Chamber, it appears that women (and girls) were subjected to rape and other forms of sexual assault during their detention at Su_ica camp. Dragan Nikolic and other persons connected with the camp are alleged to have been directly involved in some of these rapes or sexual assaults. These allegations do not seem to relate solely to isolated instances."

"The Trial Chamber feels that the prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolic with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches or war crimes."

Judge Jorda, Judge Odio Benito and Judge Riad, In re Dragan Nikolic: Decision of Trial Chamber I, *Review of Indictment Pursuant to Rule 61*(The Prosecutor v Dragan Nikolic) 1995 I.C.T.Y., No IT-94-2-R61, (Oct 20), para 33.

An effort has also been made to structure the Office of the Prosecutor (OTP) of the Yugoslav Tribunal in a manner that responds to crimes committed against women. The position of legal adviser for gender issues was created to ensure that the large number of sexual violence allegations would be properly addressed. Patricia Sellers was appointed to fill this position. There is no doubt that the appointment of a legal adviser for gender issues has greatly improved the Yugoslav Tribunal's approach to prosecuting sexual violence, and also provided an important focus for international dialogue on the issue. In addition, one investigation team has been established specifically to investigate sexual violence,¹⁵ and all investigation teams are comprised of both women and men. This is especially important because, as Ms. Sellers has pointed out, "teams that are gender-integrated tend to look at the sexual assault component of investigations earlier and with more profundity."¹⁶ Even so, there have been some problems with sexual violence investigations by the OTP of the Yugoslav Tribunal. A case in point is the indictment issued against Dragan Nikolic in relation to events which took place at the Su_ica detention camp in eastern Bosnia and Herzegovina.¹⁷ Although the indictment contained no charges of sexual violence, during a reconfirmation of the indictment before the Trial Chamber, several witnesses gave evidence about sexual violence that had occurred at the Su_ica camp. On the basis of this evidence, the Trial Chamber invited the Prosecutor to amend the indictment to include charges of sexual violence.

The question must be asked as to why these charges of sexual violence were not investigated earlier.



A commitment to prosecuting crimes of sexual violence is reflected in the Yugoslav Tribunal's Rules of Procedure and Evidence (Yugoslav Rules), which provide a series of measures designed to protect victims and witnesses testifying before the Tribunal. It was largely the anticipated prosecutions for sexual violence that prompted these provisions.

"In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape or sexual assault."

Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)), S/25704, 1993, para. 108.

The Yugoslav Tribunal has been progressive when it comes to victim and witness protection. At the Prosecutor's request a range of protective measures for victims and witnesses have been adopted, including the use of pseudonyms; the redaction of court transcripts to delete reference to the victim's identity; the giving of testimony in camera and by one-way closed-circuit television; scrambling of victims' and witnesses' voices and images; and prohibitions on photographs, sketches or videotapes of victims and witnesses.¹⁸ The most controversial aspect of the protective measures granted by the Yugoslav Tribunal has been the decision to allow, provided that certain conditions are met, the identity of some victims and witnesses to be kept from the accused even at the trial stage.¹⁹ The Yugoslav Rules also provide for the establishment of a Victims and Witnesses Unit to recommend protective measures for victims and witnesses, and to provide counseling and support.²⁰ This Unit became operational in April 1995. At the time of its creation, it was envisaged that the Unit would primarily deal with female victims of sexual violence, and a commitment was made to hiring qualified women wherever possible.²¹ The Yugoslav Rules also regulate evidence in cases of sexual violence.

Rule 96 deals with issues of corroboration, the defense of consent, and evidence of the prior sexual conduct of the victim.

The OTP of the Yugoslav Tribunal has issued a number of indictments charging sexual violence committed against both women and men during the conflict in the former Yugoslavia. In June 1996, the first indictment which deals exclusively with sexual violence was issued in relation to events that took place in the municipality of Foca, to the south east of Sarajevo. This indictment alleges that when the area was taken over by Serb forces in April 1992, many Muslim women were detained in houses, apartments, schools and other buildings, and were subjected to repeated rape by soldiers. The indictment also alleges that women and girls were enslaved in houses run like brothels, where they were also forced to perform domestic work such as washing the soldiers' uniforms.²²

Two months into the first prosecution brought before the Yugoslav Tribunal, the Tadic case, the Trial Chamber heard the first ever testimony in history, at the international level, from women regarding wartime rape. Although Tadic had been initially charged with raping a female prisoner at the Omarska camp, the charge was withdrawn prior to the commencement of the trial. However, evidence of rape was still used as general evidence against Tadic. The Celebici case, which is presently proceeding before the Yugoslav Tribunal and is expected to conclude in 1998, involves charges of rape.



Assessing the Progress

There is no doubt that the UN's response to sexual violence in the former Yugoslavia constitutes a long overdue acknowledgment that sexual violence during armed conflict is a crime that must be addressed. The problem has been formally recognized, but concerns remain about the extent to which women affected by sexual violence have actually been assisted as a result. More than four years has elapsed since the creation of the Yugoslav Tribunal, but no defendant has yet been convicted for rape. Part of the problem has been the initial inability to take defendants into custody, which frustrated the Yugoslav Tribunal's work for a number of years. This situation began to change in the second part of 1997 when several covert arrests by NATO resulted in suspects being transferred to The Hague. In addition, 10 Bosnian Croats surrendered themselves to the Yugoslav Tribunal in August 1997, approximately doubling the number of defendants in custody. In February 1998, two Bosnian Serbs surrendered themselves to the Yugoslav Tribunal, being the first Serb indictees to do so. As at 16 February 1998 there were 22 defendants in the Scheveningen detention facility in The Hague. As a result, the Tribunal's workload has increased dramatically, triggering renewed hope regarding the utility of the endeavour as a whole. It also improves the prospect of bringing to justice those persons accused of committing sexual violence during the conflict in the former Yugoslavia. Some of the defendants recently taken into custody face charges of sexual violence. For example, Anto Furundzija, who was arrested in December 1997, faces charges of sexual violence. It is alleged that he was a commander who was present while a prisoner was sexually assaulted, and that he did nothing to curtail the assault.²³ However, it is still the case that most of the indictees charged with sexual violence are not in custody.

Less encouraging is the likelihood that women who have been subjected to sexual violence will ever receive compensation for their suffering. The Yugoslav Tribunal can order the restitution of property acquired by criminal conduct.²⁴

This is an important power, because the misappropriation of dwellings, livestock and other valuables is a frequent and devastating component of conflict. However, the Yugoslav Tribunal does not have power to order compensation as part of the penalties imposed upon convicted persons, nor has a parallel claims commission, like the UNCC for example, been created. Judgements of the Tribunal do constitute conclusive proof of criminal responsibility for the injury, but the victim is required to pursue compensation claims through domestic channels. This approach assumes that domestic systems have in place the appropriate structure to provide victims with compensation. This is frequently not the case, especially in countries recovering from armed conflict.

Despite these limitations, there is now substantial evidence that the mind set of the international community has changed regarding sexual violence during armed conflict. Over the course of half a century, the issue of women and armed conflict has developed within the UN framework from a limited concern with the situation of women as mothers and care-givers to a recognition that sexual violence against women and girls is a violation of international human rights and humanitarian law that must be addressed. As described below, the issue has also been taken up in a number of other fora within the UN system.

The Vienna Conference on Human Rights, 1993

The 1993 UN World Conference on Human Rights held in Vienna was a watershed for women's human rights. Of particular significance was the recognition that violence against women, such as domestic abuse, mutilation, burning and rape, is a human rights issue. Previously, these acts had been regarded as private matters, and therefore not appropriate for government or international action. Even the Convention on the Elimination of all Forms of Discrimination Against Women



(Women's Convention), adopted in 1979, has no specific provision on violence against women. In 1985, the Nairobi Forward-looking Strategies had acknowledged the problem of violence against women, and urged governments to respond, but there was no explicit recognition that violence against women is a human rights issue. In the years following Nairobi, the issue of violence against women received consideration within the ECOSOC, particularly by the Commission on the Status of Women. In addition, in 1992 the Committee on the Elimination of Discrimination Against Women (CEDAW), the body created to monitor the Women's Convention, adopted a general recommendation on "Violence against Women."²⁵ These developments were due in part to intensified efforts by women's NGOs to draw attention to the problem. The International Women's Rights Action Watch, established to monitor the Women's Convention and the activities of CEDAW, was particularly active on the issue, as was the International League for Human Rights.²⁶

The Vienna Declaration and Programme of Action, 1993

Article 38: "Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response."

At the Vienna Conference in 1993, a number of women's NGOs, including WiLDAF (Women in Law and Development in Africa), the Asian Women's Human Rights Council, and CLADEM (Latin American Committee for Women's Rights), coordinated their action under the umbrella of the Center for Women's Global Leadership, and were responsible for highlighting the issue of violence against women.²⁷ At that time, reports of sexual violence committed against women in the former Yugoslavia had flooded the media. The accompanying worldwide outrage provided powerful support for NGO arguments that violence against women is a fundamental human rights violation, of concern to the international community at large. This convergence of factors is reflected in the text of the Vienna Declaration and Programme of Action adopted at the 1993 conference. The vulnerability of women to sexual violence during armed conflict is explicitly recognized and condemned as a human rights violation requiring a "particularly effective response."²⁸

At the Vienna Conference, a Tribunal organized by NGOs heard testimonies regarding violations of women's human rights around the world, including sexual violence during armed conflict. These testimonies included statements from former "comfort women", Palestinian, Somali, and Peruvian women, as well as women from the former Yugoslavia, who had been invited by the organizers to "testify".²⁹

The Declaration on the Elimination of Violence against Women

Developments regarding the problem of violence against women coalesced in December 1993 when the UNGA adopted the Declaration on the Elimination of Violence against Women. The Declaration identifies three main categories of violence against women, namely physical, sexual and psychological violence occurring in the family, within the general community, and that perpetrated or condoned by the State. It explicitly recognizes that women in conflict situations are especially vulnerable to violence.³⁰

The Special Rapporteur on Violence against Women

In 1994 the Commission on Human Rights appointed a Special Rapporteur on violence against women, its causes and consequences, and Radhika Coomaraswamy of Sri Lanka was named to fill the position. The Special Rapporteur has divided her reports to reflect the three main



categories of violence identified in the Declaration on the Elimination of Violence against Women. In her preliminary report, the Special Rapporteur identified sexual violence against women during armed conflict as one of the areas to be given consideration in her future report under the third category, namely violence perpetrated or condoned by the State. The Special Rapporteur is due to submit this report in 1998. It will include information collected by Ms Coomaraswamy during visits to Rwanda, Afghanistan and Haiti.³²

The Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during armed conflict

Consideration has been given to the issue of sexual violence by the UN Sub-commission on the Prevention of Discrimination and the Protection of Minorities. In September 1993, Ms. Linda Chavez, a member of the Sub-Commission, submitted a preparatory document on the Question of Systematic Rape and Sexual Slavery and Slavery-like Practices During Wartime.³³

She subsequently submitted a working paper on the topic,³⁴

and following this the Sub-commission decided that the topic warranted further consideration. Accordingly, Ms. Chavez was appointed as the Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict. In July 1996 Ms Chavez submitted her preliminary report.³⁵

The final report on the topic will be completed by Ms Gaye McDougal in 1998.

The Fourth World Conference on Women At the Fourth World Conference on Women

At the Fourth World Conference on Women, held in Beijing in November 1995, sexual violence against women during armed conflict was a major theme. This is reflected in the Beijing Declaration and Platform for Action, which identifies women and armed conflict as one of the 12 critical areas of concern to be addressed by Member States, the international community and civil society.³⁶

Beijing Platform for Action, 1995

Para. 135: "While entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex. Parties to the conflict often rape women with impunity sometimes using systematic rape as a tactic of war and terrorism. The impact of violence against women and violations of the human rights of women in such situations is experienced by women of all ages, who suffer displacement, loss of home and property, loss or involuntary disappearance of close relatives, poverty and family separation and disintegration, and who are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. This is compounded by the life-long social, economic and psychologically traumatic consequences of armed conflict and foreign occupation and alien domination."

Platform for Action Critical Area E: Women and Armed Conflict

An NGO tribunal, similar to the one held during the Vienna Conference, was held at Beijing, one session of which dealt with human rights abuses against women in conflict situations. Amongst the stories told were those of the former "comfort women" and women from Algeria, Uganda and Rwanda.

Sexual violence in Rwanda.³⁷



It appears from these developments that sexual violence is no longer the forgotten crime of armed conflict. The world has expressed its determination that sexual violence will no longer be accepted as an inevitable by-product of war. Women increasingly have a chance to have their suffering addressed. Or so it would seem. Yet in 1994, during the genocidal conflict in Rwanda, it is estimated that many thousands of women were subjected to sexual violence. According to the reports, women were raped, mutilated, forced into sexual slavery, and taken as "wives" by their captors. There are also reports of women being bought and sold amongst the Interahamwe (the term used for collective militia groups in Rwanda).³⁸

However, for a long time, the international community remained silent. Neither the Security Council nor the Preliminary Report of the Commission of Experts established by the Security Council to investigate violations of international humanitarian law during the conflict in Rwanda (Rwanda Commission) referred to sexual violence.³⁹ The NGO community was ultimately responsible for insisting that the international community place the issue on its agenda. Information about the rape and abduction of women and girls provided by African Rights was referred to in the Final Report of the Rwanda Commission.

The Final Report states that rape is an egregious breach of international humanitarian law and a crime against humanity.⁴⁰ Overall, however, the issue was given minimal consideration by the Rwanda Commission.

NGO information on sexual violence in Rwanda was also referred to in some of the later reports of Mr René Degni-Ségui, the Human Rights Commission's Special Rapporteur for Rwanda. In January 1996 the Special Rapporteur reported that "[r]ape was systematic and was used as a 'weapon' by the perpetrators of the massacres..." and that "[a]ccording to consistent and reliable testimony, a great many women were raped; rape was the rule and its absence was the exception."⁴¹

"Under-age children and elderly women were not spared. Other testimonies mention cases of girls aged between 10 and 12. Pregnant women were not spared. Women about to give birth or who had just given birth were also the victims of rape in hospitals. Their situation was all the more alarming in that they were raped by members of the militias some of whom were AIDS virus carriers (as was the case of the national chief of the militias, as several witnesses report). Women who had just given birth developed fulminating infections and died. Women who were "untouchable" according to custom (e.g. nuns) were also involved and even corpses, in the case of women who were raped just after b e i n g k i l l e d ."

Report on the Situation of Human Rights in Rwanda Submitted by René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, E/CN.4/1996/68, 29 January 1996, para. 17

The ad hoc war crimes tribunal for Rwanda

Following the creation of an ad hoc tribunal to prosecute suspected war criminals from the Rwanda conflict (Rwanda Tribunal) in November 1994, very few steps were taken to address sexual violence, despite the fact that the Statute of the Rwanda Tribunal provides as much scope for addressing sexual violence as the Statute of the Yugoslav Tribunal. In fact, in addition to listing rape as a crime against humanity as the Yugoslav Statute does, the Rwanda Statute also expressly refers to "rape, enforced prostitution and indecent assault" as violations of Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II.⁴² However, little attempt was



made to seriously investigate sexual violence. Consequently, no indictments were issued charging rape or other crimes of sexual violence until 1997.⁴³

On 23 October 1997, a 35 year old Tutsi woman known as Witness JJ took the stand and gave evidence in the trial of Jean Paul Akayesu, one of the first defendants to be tried before the Rwanda Tribunal. Akayesu was bourgmestre (mayor) of the Taba commune in Rwanda during the genocide. Witness JJ described events that had occurred while she was taking shelter in the Taba commune.

She told how the Interahamwe would come in and take away young girls and women into a nearby forest and rape them. Witness JJ described a series of occasions on which she was raped multiple times. She also explains how, by pure chance, she narrowly escaped being massacred along with the other women in the commune, because she was out buying food for her baby when the killings began.

Despite the horrifying nature of the abuses that Witness JJ described, and the need for the international community to acknowledge and redress such suffering, her story very nearly remained untold. The original indictment against Akayesu did not allege sexual violence. The trial commenced, and when other witnesses began to make consistent references in their testimony to widespread sexual violence in the Taba Commune it became clear the issue could no longer be disregarded. At this time, there was also an Amicus Curiae (friend of the court) Brief filed by the Coalition for Women's Human Rights in Conflict Situations,⁴⁴ which urged the Rwanda Tribunal to request an amendment of the indictment to include sexual violence.⁴⁵

There was a break in the trial, and when it resumed in October 1997, Akayesu was facing an amended indictment which included charges of sexual violence against displaced women who sought refuge at the Taba commune. It is not alleged that Akayesu personally committed any acts of sexual violence but rather that he is responsible for acts of sexual violence committed by others because he was present, was in a position of authority, but failed to take any action to prevent it.⁴⁶

Factors Affecting the Response to Sexual Violence During Armed Conflict

There are many factors that affect the extent to which sexual violence against women and girls during armed conflict is recognized and addressed. Between Nuremberg and Tokyo on the one hand, and the former Yugoslavia on the other, a strong and mobilized feminist movement has emerged that is exerting pressure and demanding redress for atrocities specifically directed at women and girls. Women's NGOs have been instrumental in insisting that steps be taken to address crimes of sexual violence.

NGOs Assisting Women in the Former Yugoslavia Include:

B.a.B.e. (Zagreb)
Center for Women War Victims (Zagreb)
Humanitarian Law Fund (Belgrade)
Kareta (Zagreb)
SOS (Belgrade)
Tresnjevka (Zagreb)

NGOs Assisting Women in Rwanda Include:

Association de solidarité des femmes rwandaises (Asoferwa)
Association des veuves du génocide d'Avril (AVEGA)
Association des volontaires de la paix (AVP)
Benishyaka



Group Kamaliza
Isangano
Pro-Femmes/Twese Hamwe

However, as the case of Rwanda demonstrates, continued vigilance is required to ensure that sexual violence in all conflicts is addressed. One of the major reasons cited for the failure to address sexual violence in Rwanda is that cultural attitudes inhibited women from talking about what had happened to them. Clearly, cultural factors do influence the way that women react to sexual violence and other traumatic experiences. In many cultures, particularly those in which sexual purity is highly valued, women frequently find it difficult to talk about sexual violence. However, many women in all cultural contexts want to tell their stories, provided that certain measures are taken to minimize the associated trauma. Women must be given a viable choice, and it is up to the international community to demonstrate that the situation of women really can be improved by coming forward. Necessary measures include the use of female investigators and interpreters, and guarantees of appropriate protection for women who testify in court.

The absence of adequate witness protection has been a significant impediment to women testifying before the Rwanda Tribunal. The Rules of Procedure and Evidence of the Rwanda Tribunal provide the same protections to victims and witnesses as the Yugoslav Rules, but witness protection is an extremely difficult issue, requiring cooperation between the local authorities and the Tribunal's witness protection programme. NGO reports suggest that many survivors of sexual violence in Rwanda are inhibited from coming forward due to fear of death, harassment and intimidation.

A report called *Witness Protection, Gender and the ICTR*, has been prepared by the Centre for Constitutional Rights, International Centre for Human Rights and Democratic Development, International Women's Law Clinic and MADRE. It asks for the provision of trauma counsellors for women, support persons to accompany witnesses travelling to the seat of the Rwanda Tribunal in Arusha, together with consistent follow-up.⁴⁷

Conclusions: Future Perspectives

There have been several signs that sexual violence against women during armed conflict will continue to be accorded attention within the UN framework. In addition to the upcoming reports of the Special Rapporteur on violence against women, and the report of the Special Rapporteur on systematic rape, sexual slavery, and slavery-like practices during periods of armed conflict, there has been specific consideration given to the impact of armed conflict upon girl children. In 1993, the GA requested that a study be carried out on the impact of armed conflict upon children, and Ms. Graça Machel was appointed to head the study. Ms. Machel's Final Report recognizes that children, and especially girls, are vulnerable to sexual exploitation in many settings during armed conflict. For example, girls who become child soldiers are frequently subjected to rape and other forms of abuse, as are girls who are refugees or displaced persons. The report states that "[c]hildren may also become victims of prostitution following the arrival of peacekeeping forces."⁴⁸ In September 1997 the UN Secretary-General appointed Mr Olara Otunnu as his Special Representative for Children in Armed Conflict. Sexual violence perpetrated against children falls within the terms of his mandate.

UN Expert Group Meeting on Gender Persecution Toronto, Canada, November 1997 (Excerpts)

Recommendations: A. Legal Definitions and Standards Sex-based crimes be referred to in the Statute of the ICC, but they should not be explicitly defined, so that the legal meaning of these crimes can be informed by the progressive interpretation of international law...; Sexual violence be considered to be within the definition of torture for the purposes of the United Nations



Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984.

B. Training, Dissemination and Education. Adequate professional support and appropriate gender training should be provided for all departments of the ad hoc War Crimes Tribunals and the ICC, especially the Witness Protection Unit of the Registry. All UN peace-keepers should receive adequate training in international humanitarian law, human rights law and gender issues. The training and pre-training programmes of UN peacekeepers with regard to their mission should reflect sensitivity to women's particular security rights and be informed on cultural specificities. Trainers should include civilians, women and experts in gender issues. A Code of Conduct for UN peace-keepers should be elaborated, including behaviour of forces with respect to women. Women in afflicted areas should be given training in land-mine awareness classes that are accessible to all people.

C. Participation

Gender balance in international judicial posts should be an explicitly stated goal; gender balance should be a consideration in judicial appointment alongside the existing requirement of geographic distribution , and professional and personal qualities;

D. Implementation, Monitoring and Accountability. The international community should take responsibility for the safety of those willing to testify before international tribunals to ensure effective administration of justice. An adequate protection programme for witnesses and potential witnesses and other forms of ancillary services, including physical and mental health, social and other services to promote the interests of witnesses and potential witnesses and to ensure the effective functioning of the ad hoc War Crimes Tribunals and the ICC is essential; A trust fund to assist in the provision of financial resources for witness protection and related services should be established; Special attention should be directed to long-term health needs such as psychological consequences arising from trauma and the effects of violations of reproductive rights such as being forced into bearing children or being denied the freedom to bear children.

Also of note are the negotiations currently underway for the establishment of a permanent international criminal court (ICC). Proposals for such an institution have been on the UN agenda for over half a century. It appears that finally, the creation of an ICC is close to reality. In 1994 the International Law Commission delivered its proposed Draft Statute for an International Criminal Court and further deliberations have taken place in various forums since then. It is anticipated that the statute for the ICC will be adopted during an international conference in Rome in June 1998. Efforts are being made to ensure that sexual violence is expressly included, in an appropriate manner, within the jurisdiction of the ICC. Efforts are also being made to ensure that the mechanisms for initiating investigations and prosecutions are responsive to the seriousness of crimes committed against women. In this respect, gender balance in all areas of the ICC's operation should be a priority. Once again, NGOs have been at the heart of efforts to incorporate a gender perspective into the negotiations surrounding the ICC. In particular, the Women's Caucus for Gender Justice in the ICC has worked extensively to put the issue of women on the agenda during deliberations.⁴⁹

The inclusion of women and armed conflict as one of the 12 critical areas in the Beijing Platform for Action, provides an important guarantee that the problem of sexual violence during armed conflict will be accorded priority into the next millennium. One recent initiative in the follow-up to Beijing was the Expert Group Meeting (EGM) convened by the Division for the Advancement of Women, in Toronto, Canada, in November 1997. The topic of the meeting was "Gender-Based Persecution". The threat of gender-based persecution, which includes sexual violence, is a risk



shared by both women and girls in situations of armed conflict, as well as those who seek to escape armed conflict internally and via refugee flight. The EGM made recommendations, directed at national, regional and international actors, for addressing the problem of gender-based persecution. The recommendations fall under four categories, namely: legal definitions and standards; training, dissemination and education; participation; implementation, monitoring and accountability.⁵⁰

The Toronto meeting was the first Expert Group Meeting convened by the Division for the Advancement of Women to consider the protection of women during armed conflict, and form part of the preparations for the forty-second session of the Commission on the Status of Women, held in March 1998. Women and armed conflict was one of four critical areas from the Beijing Platform for Action which was reviewed by the Commission. The 45 Member Commission adopted Agreed Conclusions on the issue of Women and Armed Conflict. The meeting was also part of the Division's contribution to the 50th Anniversary of the Universal Declaration of Human Rights.

The conflict in the former Yugoslavia was the catalyst that brought the issue of sexual violence during armed conflict squarely onto the international agenda, but much more remains to be done.

Formal recognition of the problem is an important first step, but this must now be translated into a positive outcome for women and girls affected by sexual violence in all armed conflicts.

This issue of women2000 was compiled by the Women's Rights Unit, United Nations Division for the Advancement of Women, with Michelle Jarvis, Consultant.

Notes

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- 42 The jurisdiction of the Rwanda Tribunal differs from that of the Yugoslav Tribunal due to the fact that Rwanda is primarily classified as an internal conflict, where as the conflict in the former Yugoslavia has elements of both internal and international conflicts. Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II apply specifically to internal conflicts.



43 An indictment charging sexual violence was issued secretly by the Rwanda Tribunal in May 1997, although it was not made public until several months later. See: *In re Pauline Nyiramasuhuko and Arsene Sholom Ntahobali: Indictment (The Prosecutor v Pauline Nyiramasuhuko and Arsene Sholom Ntahobali)*, I.C.T.R.-97-24-I, 26 May 1997

44 This coalition is comprised of more than 100 organizations working on issues related to women's human rights in conflict situations, and is coordinated by the International Center for Human Rights and Democratic Development, in Montreal, Canada. For further information about the Coalition, contact Isabelle Solon-Helal via email

45 Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal, May 1997. The Amicus Brief can be accessed online at

46 *In re Jean Paul Akayesu: Indictment, (The Prosecutor v Jean Paul Akayesu)*, (1996) I.C.T.R. No. 96-4-I (Amended June 1997), para. 12(B).

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49 The Women's Caucus for Gender Justice in the ICC can be contacted at +1-212-697-7741 or email.

50 For further details see United Nations Expert Group Meeting on Gender-based Persecution, 9-12 November 1997, (EGM/GBP/1997/Report).



SUPPLEMENTARY READING 10

THE INTERNATIONAL CRIMINAL COURT: AN IMPORTANT STEP TOWARD EFFECTIVE INTERNATIONAL JUSTICE

*By Norman Dorsen and Jerry Fowler**

A remarkable development in the ten years since the fall of the Berlin Wall is the growing consensus in support of international mechanisms for enforcing international humanitarian law. The United Nations Security Council established ad hoc tribunals to try individuals guilty of atrocities in the Former Yugoslavia and Rwanda. A UN commission of experts has recommended creation of a similar panel to try senior leaders of the Khmer Rouge regime responsible for the deaths of nearly 2 million Cambodians from 1975 to 1979.[1] And a Spanish judge has requested the extradition from the United Kingdom of former Chilean dictator Augusto Pinochet for mass murder and torture committed by his regime.

Perhaps the most compelling evidence of this consensus is the overwhelming approval last summer by a Rome diplomatic conference of a treaty to create a permanent international criminal court.[2] The enthusiasm evident in Rome has not abated. In the months since, 76 countries have indicated an intent to ratify by signing the treaty, and Senegal has become the first nation to ratify. The court will be set up once 60 nations have ratified the Rome Statute.[3] Once established, it will have jurisdiction over genocide, crimes against humanity and serious war crimes in situations where there is not a national judicial system available.

The actual creation of the Court will not be the end of the challenge to enforce international humanitarian law effectively. As explained below, jurisdictional limitations and other aspects of the Statute will hamper the Court's effectiveness. But the Statute does establish the basic framework for a legitimate judicial institution capable of combating impunity for crimes of mass violence. The ultimate success of the Court will depend upon the political will of the international community to enforce compliance with the Court's judgments and orders.

Historical Background

The Rome Statute caps a century of international humanitarian law development that began in 1899 with the Peace Conference in the Hague. Even as humanitarian standards developed, however, the 20th Century's appalling carnage highlighted the need for effective enforcement of those standards. Impunity for the worst atrocities was too often the rule. The idea of an international tribunal to hold individuals responsible for international crimes was widely discussed after World War I. The victorious Allies established a Commission of Responsibilities of the Authors of the War and the Enforcement of Penalties to consider how to deal with accused war criminals. The Commission divided sharply on the issue of an international tribunal, with the majority recommending the creation of an international "High Tribunal" to try individuals accused of "violations of the laws and customs of war and of the laws of humanity." The American delegation, headed by Secretary of State Robert Lansing, dissented. The Americans objected, among other things, to the undefined concept of "laws of humanity"[4] and to the idea of an international criminal tribunal, "for which there is no precedent, precept, practice, or procedure." [5]



The Versailles Treaty was signed the month after the Commission's report. Article 227 provided for the creation of an international tribunal to try the Kaiser "for a supreme offence against international morality and the sanctity of treaties." As for other accused war criminals, the Treaty opted for trial by military tribunals of the individual Allied countries and required German cooperation with those efforts. In the end, the tribunal for the Kaiser was never established, and Allied trials of other officials never occurred.^[6]

The issue of dealing with war criminals was even more salient at the end of World War II, given the scope of Nazi atrocities. The Nazi campaign of extermination waged against Germany's Jewish population, as well as other outrages that did not fall within the scope of war crimes, starkly presents the issue of whether there are internationally prohibited "crimes against humanity."

In contrast to the American opposition to international justice in 1919, the idea of putting top Nazi leaders on trial at the end of World War II originated in the United States. Other allies initially favored summary execution of German leaders. But there was a strong feeling among US leaders that a larger and more valuable point could be made by formally charging those men with criminal violations of international law. An international trial would help strengthen the rule of law over the rule of force. As U.S. Supreme Court Justice Robert Jackson, the chief prosecutor at the trial of major war criminals, explained in his opening statement, "that four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."^[7]

Even more importantly, the Nuremberg trial established that the international community can hold individuals personally accountable for committing heinous crimes. Presciently noting that the Nazi leaders embodied "sinister influences that will lurk in the world long after their bodies have returned to dust," Justice Jackson went to the heart of the matter: "The [Nuremberg] Charter recognizes that one who has committed a criminal act may not take refuge in superior orders nor in the doctrine that his crimes were acts of state."^[8] The Nuremberg defendants were charged with three types of substantive crime: war crimes, crimes against humanity and crimes against the peace (or aggression).

The vital principle of individual accountability for these international crimes was reiterated in the judgment handed down by the Nuremberg Tribunal. Rejecting the defendants' argument that international law deals only with the actions of sovereign states, the judges held that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."^[9] In the years after Nuremberg, the principle of individual accountability took root. In 1948, the Genocide Convention defined genocide and made it an international crime for which individuals could be held responsible, either before national courts or a contemplated international tribunal.^[10] The four Geneva Conventions of 1949 codified many of the laws of war and established individual responsibility for grave breaches of those laws.^[11] In 1950, the International Law Commission (ILC), a body of legal experts acting at the direction of the UN, distilled the "Principles of the Nuremberg Tribunal." The first principle was that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." More recently, countries ratifying the Convention Against Torture obligated themselves to extraditing or prosecuting any public official or person acting in an official capacity found in their jurisdiction who is accused of committing torture, no matter where the torture occurred.



Although the principle of individual accountability became well established, there was no progress in creating a mechanism to enforce that principle. Hopes for a permanent international court were dashed by Cold War rivalries, and proposals for such a court were shelved, left to gather dust for four decades. The "tragic irony"^[12] was that international humanitarian law gained wide acceptance, but was seldom enforced.

The end of the Cold War made the creation of a permanent court politically possible. As more and more countries replaced authoritarian and totalitarian regimes with democratically accountable governments, sentiment in favor of international mechanisms of accountability grew. Among the countries active in the so-called "like-minded group" pushing hardest for the creation of the Court were nations such as South Africa, Argentina and South Korea. The horror of ethnic cleansing in the former Yugoslavia and of genocide in Rwanda added urgency to efforts to create a permanent court.

The ad hoc tribunals set up to deal with the former Yugoslavia and Rwanda demonstrated the possibilities of international enforcement, but also made clear that an ad hoc approach was no substitute for a permanent court. The ad hoc tribunals had to start from scratch in hiring judges and prosecutors, drafting procedural rules, even building courtrooms. Moreover, their ad hoc nature left them open to charges of political motivation and selective justice. Intensive international negotiations to create a permanent court proceeded through the 1990s. The five-week conference that ended with overwhelming international support for the Rome Statute represented the culmination of those efforts. On the cusp of a new century, the world stands poised to create an important international institution for upholding the rule of law.

An Incremental Step

Although the Rome Statute represents an important step toward establishing accountability for crimes of mass violence, it is nevertheless incremental. Several aspects of the Statute demonstrate the measured nature of what was agreed to: the Court's narrow subject matter jurisdiction; the primacy of national judicial systems; strict, sovereignty-related preconditions to the exercise of any jurisdiction; and a very conservative regime for state cooperation.

The Court's Subject Matter Jurisdiction

The Court will have very narrow subject matter jurisdiction, limited to "the most serious crimes of international concern": genocide, crimes against humanity and serious war crimes, the so-called "core crimes."^[13] High thresholds and definitions that in some cases are narrower than existing international law will further limit the Court.

Genocide. The definition of genocide was not controversial and was taken from the 1948 Genocide Convention. The essence of this most horrific of crimes is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." (Article 6)
Crimes Against Humanity. A major achievement of the Rome Conference was the codification in a multilateral treaty, for the first time since the Nuremberg Charter, of crimes against humanity. (Article 7) For purposes of the Court's jurisdiction, a crime against humanity is an inhumane act, such as murder, torture or rape, when committed against a civilian population pursuant to a state or organizational policy. It must be part of "a course of conduct involving the multiple commission" of inhumane acts, and the defendant must have knowledge of the overall plan. The Court will have jurisdiction without regard to whether the perpetrators are government officials and without regard to the existence of armed conflict.



The Rome Statute sets a high bar to the Court's jurisdiction over crimes against humanity by the way that it defines "attack directed against any civilian population." That term only covers conduct that is "pursuant to or in furtherance of a State or organizational policy." (Article 7(2)(a)) Thus, no matter how widespread acts such as murder might be, they will not fall within the ICC's scope unless there is a showing that they were committed in the execution of a State or organizational policy. Because of this requirement, the Court's jurisdiction over crimes against humanity will not reach as broadly as customary international law,^[14] reflecting the drafters' intent that the Court be limited to the most serious crimes of international concern.

A major development in the Rome Statute is the explicit inclusion of crimes of sexual assault as crimes against humanity and war crimes. Among the acts that can constitute crimes against humanity and war crimes are "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." (Articles 7(1)(g) (crime against humanity); 8(2)(b)(xxii) (war crime in international armed conflict); see also 8(2)(e)(vi) (war crime in internal armed conflict)) The explicit enumeration of these acts as crimes within the Court's jurisdiction is a critical affirmation that rape and other crimes of sexual assault are, under appropriate circumstances, among "the most serious crimes of concern to the international community as a whole."

Serious War Crimes. The Rome Statute gives the Court jurisdiction over serious war crimes committed in both international and internal armed conflicts. (Article 8(2)) The war crimes article of the Rome Statute draws from sources such as the four 1949 Geneva Conventions and other conventional and customary laws of war. Although in some cases the treaty provides narrower definitions than existing international law, the scope of the war crimes article will allow the Court to address the most serious atrocities committed in armed conflict. In particular, the inclusion of war crimes committed in civil wars was vital, because most conflicts in the modern world take place within the borders of a single nation.^[15]

As with crimes against humanity, jurisdictional limits were attached to war crimes. First, the Court will have war crimes jurisdiction "in particular" when those crimes are "part of a plan or policy or part of a large-scale commission of such crimes." (Article 8(1)) This language presumptively restricts the Court to cases in which war crimes are either systematic or widespread, though it gives the Court the leeway to act, if circumstances dictate, even in the absence of evidence of a plan or of large-scale commission of war crimes. Second, the Court will have jurisdiction over many crimes committed in internal armed conflict only when "there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." (Article 8(2)(f))

Superior Orders. Unlike the defendants at Nuremberg and before the Yugoslavia and Rwanda tribunals, those tried by the ICC for war crimes will be able to offer superior orders as a defense. Under the Rome Statute, a defendant will be able to avoid criminal responsibility by showing that he was under a legal obligation to obey the order, that he did not know that the order was unlawful and that the order was not manifestly unlawful. (Article 33) The defense, however, is not available to those accused of genocide or crimes against humanity. (Article 33(2))

Command Responsibility. The Rome Statute also departs from the Tribunal statutes by making it more difficult to establish the criminal responsibility of the civilian superiors of those who commit war crimes or other crimes within the Court's jurisdiction. (Article 28) For example, Article 7(3) of the Statute of the Yugoslavia Tribunal provides that any superior, military or civilian, can be held criminally responsible for the acts of a subordinate if the superior "knew or had reason to know" of the subordinate's actions and the superior "failed to take the necessary and reasonable



measures" to prevent or punish the acts. Under the Rome Statute, this standard applies only to military commanders. (Article 28(1))

Civilian leaders, by contrast, can be held responsible only if (i) the subordinate was under the superior's "effective authority and control;" (ii) the subordinate's criminal acts were "a result" of the superior's "failure to exercise control properly;" (iii) the superior "knew, or consciously disregarded, information that clearly indicated" a crime was being or would be committed; (iv) the criminal activities "were within the effective responsibility and control" of the superior; and, finally, (v) the superior did not take all reasonable and necessary measures to prevent or punish the crimes. (Article 28(2) (emphasis added)) This provision obviously raises a high bar to the successful prosecution of civilian leaders.

The Primacy of National Judicial Systems

The Court is not intended to replace functioning judicial systems. Rather, the goal is to provide an alternative to impunity where independent and effective judicial systems are not available. Thus, a fundamental principle of the Rome Statute is that the Court must defer to national courts, except in those cases where they are "unwilling or unable genuinely" to investigate or prosecute. (Article 17) This principle, known as "complementarity,"^[16] can be invoked by interested states and by individuals who have been accused of crimes to block Court action. (Article 18; Article 19) The exceptions to the basic presumption of deferral to national systems are quite narrow. By the treaty's terms, "unwillingness" in effect requires that national proceedings be undertaken in bad faith before the ICC can step in. (Article 17(2)) Thus, the use of established, transparent judicial procedures - the norm in the military and civilian courts of established democracies governed by the rule of law - precludes a finding of "unwillingness." Unwillingness is not established just because an investigation does not result in prosecution. When a State carries out its obligation to investigate, even if it decides not to prosecute, the Court will be barred from acting. "Inability" means "a total or substantial collapse or unavailability" of the national courts. (Article 17(3)) This exception would apply to countries in which the judiciary has ceased in whole or substantial part to function. It would not apply to a state with a functioning judicial system, even if the system had structural flaws.

Article 18, which was proposed and strongly pushed by the United States, allows a state to assert the primacy of its national system with regard to individuals within its jurisdiction at the very outset of an investigation, even before individual suspects have been identified. The Prosecutor must defer to the state unless she can bear the burden of convincing two panels of judges that the state is not willing and able genuinely to investigate and prosecute. On the one hand, this provides a safeguard against an overzealous prosecutor interfering with a functioning and independent judicial system (such as the United States). But it also offers authorities in less responsible states an opportunity to delay and obstruct an investigation. The complementarity provisions were strongly supported by countries that wanted to limit the ICC's reach. Their immediate concern was to ensure that the Court would not oust a functioning national system that is available to deal with allegations of wrongdoing against a country's own nationals. The extradition proceedings in the United Kingdom against former Chilean dictator Augusto Pinochet cast complementarity in a different light. Ironically, those that fretted about an ICC with too much reach now see that it might be a desirable alternative to national courts exercising universal jurisdiction. Nevertheless, the Statute's complementarity provisions, as well as jurisdictional limitations described below, will sharply curb the Court's scope.

Preconditions To The Exercise Of Jurisdiction



Court proceedings will be "triggered" in three ways: by the Security Council acting under Chapter VII of the UN Charter,^[17] by a State Party to the statute and by the Prosecutor acting on her own initiative ("proprio motu"). (Article 13)

When the Security Council refers a "situation,"^[18] the Court will be able to exercise its jurisdiction without regard to whether interested countries, such as the country of a suspect's nationality, have accepted the Court's jurisdiction. The authority for the Court's jurisdiction in such circumstances, like the authority of the ad hoc tribunals created by the Security Council, stems from the Security Council's plenary authority to maintain international peace and security. Thus, the Court's reach is greatest when it is given a Security Council mandate. As with any Security Council action, referrals to the Court will require the support of all five permanent members, as well as an overall majority of the Security Council. This form of triggering the Court's jurisdiction represents an institutionalization of the precedent of the ad hoc tribunals.^[19] The Court's reach is much more limited if proceedings are triggered by a State Party referral or initiated on the Prosecutor's own motion.^[20] In those circumstances, the Court can exercise its jurisdiction only if either (a) the state on whose territory conduct in question occurred or (b) the state of nationality of the accused has accepted the Court's jurisdiction. (Article 12(2)) States accept the Court's jurisdiction by ratifying the treaty or filing an ad hoc declaration. (Article 12(1), (3))

The jurisdiction of the Court is thus firmly tied to the sovereign power of the states that create it. Any state has undoubted authority to adjudicate crimes committed on its territory or the conduct of its nationals. In non-Security Council cases, the Court's authority thus stems directly from this underlying sovereign authority.

This sovereignty-based limitation on the Court's jurisdiction will sharply restrict its ability to deal with many situations that might otherwise involve "the most serious crimes of international concern." Many, if not most, of the nations on whose territory the crimes subject to the Court's jurisdiction are likely to be committed or whose nationals are likely to be responsible for such crimes will not be among the early parties to the Rome Statute. Iraq, for example, voted against the treaty and will not be likely to join, at least as long as Saddam Hussein is in power. The preconditions of territory and nationality therefore mean that for many years the ICC will be primarily a Security Council court. And whenever the Security Council is unable to act, whether because of a permanent member's veto or because of a simple lack of political will, the Court also will be unable to act.

Some have argued that the limitations of Article 12 will leave the Court a permanent invalid. It is certainly true that for this generation and perhaps the next, Article 12 will seriously hamper the Court. But the hope among human rights groups and other supporters of the Court is that it eventually will obtain universal acceptance, allowing it to serve future generations as an independent and effective judicial institution. Over time, many of today's rogues will be replaced, even if temporarily, by governments that will seek full membership in the community of nations by, among other things, ratifying the Rome Statute. And once a nation is a party, future autocrats will find their options limited. Denunciation of the Statute will incur serious public relations costs and not become effective for a year, leaving substantial exposure to prosecution. As restrictive as it is, Article 12 is the central reason that the United States has given for opposing the Statute.^[21] The U.S. objects to the territorial basis for the Court's jurisdiction, insisting that the Court only be able to exercise jurisdiction if the state of the suspect's nationality has acquiesced. United States officials have labeled the territorial basis "a form of jurisdiction over non-party states" and denounced it as "contrary to the most fundamental principles of treaty law." These harsh words notwithstanding, there is nothing remarkable about a state's deciding how to adjudicate crimes that occur on its territory, especially when those crimes are among the most



serious imaginable. Indeed, the territorial basis for jurisdiction is probably stronger even than nationality.^[22]

The reference to "jurisdiction over non-party states" is misplaced. The Rome Statute does not accord the Court jurisdiction over any "state." Rather, the Court will have jurisdiction over individuals - in particular, individuals who have committed crimes on the territory of an accepting state or who are nationals of an accepting state. The treaty does not bind states that are not parties. Such states have no obligation, for example, to surrender suspects, cooperate with investigations or do anything else.

Article 12's final text is much narrower than proposals that enjoyed widespread support at Rome. For example, there was strong sentiment in favor of including the state that has custody over a suspect and the state of the victim's nationality on the list of countries whose acceptance could provide a basis for the Court's jurisdiction. Pressure from the United States and other major powers forced the eventual compromise.

Including the custodial state as a basis for the Court's exercise of jurisdiction would have significantly extended the Court's reach. It would at least have caused the perpetrators of these crimes to remain within the borders of their own countries or face the possibility of apprehension. The Pinochet case has illustrated the usefulness of such a jurisdictional basis. As the treaty stands now, however, the Court will be powerless to prosecute an individual who is accused of genocide and who is in the custody of a signatory state, absent some other basis for jurisdiction. Depriving the Court of this basis of jurisdiction illustrates the incremental nature of the Rome Statute. It is widely accepted, including by the United States government, that a custodial state has the authority to try an individual for genocide. And the 1949 Geneva Conventions impose on states an explicit obligation to prosecute or extradite individuals in their custody who are accused of grave breaches of those treaties - all crimes that are included in the Court's jurisdiction. Yet under the terms of the Rome Statute, the Court created by a group of states has less jurisdictional reach than any one of them has individually. Including the state of the victim's nationality also would have extended the Court's reach in a meaningful way. In particular, it would have provided increased protection to soldiers sent on peacekeeping missions in the territory of non-ratifying countries. The Court would have been able to exercise its jurisdiction over war crimes committed against such peacekeepers, even if neither the territorial state nor the state of the perpetrator's nationality accepted jurisdiction. The irony is that those nations most intent on restricting the scope of the Court's jurisdiction are among those who profess greatest concern for the relationship of the Court to soldiers on international peacekeeping missions.

Enforcement and Compliance

Effecting compliance with the Court's orders and decisions will be one of the great challenges facing those countries that ratify the Statute and comprise the Assembly of States Parties. Article 86 imposes on States Parties an obligation to "cooperate fully with the Court." But the Court itself will have no practical means to enforce its orders and decisions. In cases initiated by the Prosecutor or pursuant to a State Party referral, the Court can refer cases of non-compliance to the Assembly of States Parties. It will then be up to the Assembly to bring pressure to bear on recalcitrant states. (Article 87(7)) In cases where the Court is acting pursuant to a Security Council referral, the Court can turn to the Council for assistance. (Article 87(7)) Under those circumstances, the Council would be able to use its plenary authority under Chapter VII. The practical challenges of obtaining compliance will be exacerbated by the fact that the Statute does not give the Prosecutor the authority to conduct investigations independently of national authorities. Under the ICTY Statute, the Prosecutor is accorded unqualified power to question individuals, collect evidence and conduct on-site investigations. She "may, as appropriate, seek



the assistance of the State authorities concerned." (Statute of the ICTY, Article 18(2)) Recent events in Kosovo have demonstrated the difficulty of actually exercising that authority. The ICC Prosecutor can investigate only by means of requesting the assistance of a State Party in accordance with the Statute and "under procedures of national law." (Article 93(1)) Although States Parties are required to "ensure that there are procedures available under their national law for all forms of cooperation" (Article 88), the requirement of working through national procedures offers tremendous opportunity for mischief by recalcitrant governments. One can imagine how much more problematic Justice Arbour's efforts in Kosovo would be if she were required to obtain assistance from the Yugoslav authorities under Yugoslavian national procedures. The Statute also gives States scope to refuse information on national security grounds (Article 72) and resist cooperation "on the basis of an existing fundamental legal principle of general application" (Article 93(3)).

The Next Steps

Even as signature and ratification proceed, many details remain to be worked out before the Court can become operational. A Preparatory Commission met in February and will continue with periodic meetings through the year 2000 in order to draft the Court's Rules of Procedure and Evidence and other documents. Among those other documents is one that specifies "Elements of Crimes." Pushed by the U.S. at Rome, the Elements are intended to assist the Court and Prosecutor in the interpretation and application of the definitions of crimes found in Articles 6, 7 and 8 of the Statute.

A big question mark is the attitude of the United States. So far, the U.S. has expressed an interest in continuing to discuss its concerns with other countries, and a U.S. delegation participated constructively in the February meeting of the Preparatory Commission. But some voices inside the Administration and on Capitol Hill are urging a more antagonistic approach to the Court. It is difficult to see how a hostile approach would serve any U.S. interest. United States opposition - no matter how active -- is unlikely to stop the Court from coming into existence, given the breadth and depth of international support for the Statute. But it would deprive the U.S. of any influence over the details of the Court's procedures and undermine U.S. efforts to promote its interest in the enforcement of international law in other areas, such as the work of the ad hoc tribunals and Security Council resolutions on Iraq.

Conclusion

The creation of a permanent international criminal court was unimaginable a decade ago. But the remarkable nature of the growing consensus on international justice should not obscure the fundamentally incremental character of the Rome Statute. Many aspects of the Statute will limit the Court's effectiveness: the restrictions of Article 12, departures from international law on superior orders and command responsibility, the restrictive nature of the definition of crimes against humanity, the threshold for war crimes, the conservative regime for state cooperation - to name some of the most problematic. It will under any circumstances depend upon the political will of the international community to enforce its judgments and orders. As ratification of the Court approaches universal, its jurisdictional reach will be global. On balance, the Statute offers a viable framework of international justice for future generations and represents a step, however measured, toward ending impunity for crimes of mass violence.

Endnotes:

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1. Elizabeth Becker, U.N. Panel Wants International Trial for Khmer Rouge, N.Y. Times, at A1 (Mar. 2, 1999).
2. The treaty's official title is Rome Statute of the International Criminal Court, A/CONF.183/9 (July 17, 1998). It was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court by a vote of 120 in favor to 7 against, with 21 abstentions. The text can be found at: www.un.org/law/icc/statute/rome.htm. Briefing papers prepared before and after the Rome Conference by the Lawyers Committee for Human Rights can be found at <http://www.lchr.org>. The Lawyers Committee site includes answers to frequently asked questions.
3. In the meantime, a Preparatory Commission will be meeting to draft Rules of Procedure and Evidence and "Elements of Crimes" intended to assist the Court in the interpretation and application of the definitions found in Articles 6, 7 and 8.
4. The term "laws of humanity" appears in the so-called Martens clause of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land. The Martens clause is a type of savings clause that, in contrast to the reciprocal protections of the Convention, provides that all inhabitants and belligerents enjoy the protection of "the principles of the law of nations, as established by and prevailing among civilized nations, by the laws of humanity, and the demands of the public conscience." See Roger S. Clark, "Crimes Against Humanity," in George Ginsburgs & V.N. Kudriavtsev, *The Nuremberg Trial and International Law* 177-212 (1990).
5. See Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History* 3-10 (1997).
6. As an alternative to Allied trials, the Germans agreed to prosecute 45 individuals (out of almost 900 accused). Only twelve actually faced trial, of whom 6 were convicted, receiving little or no punishment. Marrus, *supra*, at 12.
7. Quoted in Robert E. Conot, *Justice at Nuremberg* 105 (1983).
8. *Id.*
9. Judgment of the International Military Tribunal for the Trial of German Major War Criminals ("Nuremberg Judgment") at 41 (Nuremberg, Sept. 30- Oct. 1, 1946).
10. Over 125 countries, including the US, are parties to the Genocide Convention.
11. Acceptance of the 1949 Geneva Conventions is virtually universal - 188 countries, including the US, have ratified. The Conventions deal with the treatment during war of wounded, sick and shipwrecked military personnel, prisoners of war and civilians.
12. Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* xiii (1998).
13. The treaty also provides that the Court will have jurisdiction over aggression, if the treaty is amended to define the crime and to provide for the conditions under which the Court will exercise that jurisdiction. (Article 5) Given deep international divisions over definitional issues and over the Security Council's role in determining whether aggression has occurred, as well as the treaty's onerous amendment requirements, the Court is not likely to be able to exercise jurisdiction over the crime of aggression for many years to come.
14. Customary international law provides that either widespread or systematic acts can constitute a crime against humanity, without regard to the existence of a policy to commit the acts. See *Prosecutor v. Tadic*, No. IT-94-1-T, para. 646 (May 7, 1997).
15. See K.J. Holsti, *The State, War, and The State of War* 25 (1996). Surveying the past 480 years, Professor Holsti finds that "classical interstate wars have declined dramatically compared to previous historical periods, and constitute only about 18 percent of all wars since 1945."
16. The treaty's Preamble "emphasiz[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." (Emphasis in original.) Article 1 also specifies that the Court "shall be complementary to national criminal jurisdictions."
17. Chapter VII of the UN Charter gives the Security Council plenary authority to maintain or restore international peace and security.
18. The Statute provides that the Security Council or a State Party can refer a "situation in which on or more of [the] crimes [within the Court's jurisdiction] appears to have been committed." (Article 13(a),(b))
19. The Security Council also will have the power when acting under Chapter VII to defer investigations or prosecutions



for renewable twelve-month periods. (Article 16) In light of these powers to trigger and defer investigations, it is surprising that some opponents of the ICC in the US Congress, such as Senator Jesse Helms (R-NC) and Senator Rod Grams (R-MN), criticize the Rome Statute as an attempt to do an "end run" around the Security Council. Senator Grams has asserted that the treaty is "a great victory for the critics of the Security Council." In fact, the most vociferous critics of the Security Council - such as India, Iraq and Libya - refused to support the treaty, while three of the five permanent members of the Security Council voted for it.

20. In order to alleviate concerns of prosecutorial abuse of power, the Rome Statute tightly circumscribes the Prosecutor's authority. Before she can proceed on her own initiative, she must convince a panel of judges that the investigation has "a reasonable basis" and that the case is within the Court's jurisdiction. (Article 15(4))

21. For a more complete discussion of U.S. objections to the Court, see Lawyers Committee for Human Rights, *The International Criminal Court: The Case for U.S. Support* (December 1998) and Jerry Fowler, *World Leadership and International Justice: The United States and the International Criminal Court*, *Translex* (Transnational Law Exchange), at 3 (Feb. 1999)

22. See Restatement (Third) of the Foreign Relations Law of the United States, § 402, comment (1987) ("Territoriality is considered the normal, and nationality the exceptional, basis for the exercise of jurisdiction.").

SUPPLEMENTARY READING 11

The law of internal crisis and conflict

by Tom Hadden and Colin Harvey

The relationship between international human rights law and the international law of armed conflict is a long-standing issue. [1] For many years the two were widely regarded as distinct areas. And there are still some who continue to think of international humanitarian law, as it is usually termed, [2] as an entirely separate discipline. The most recent ***Handbook of Humanitarian Law in Armed Conflict*** [3], for example, makes no reference at all to human rights law. The prevailing view, however, is that human rights law and the law of armed conflict are complementary in that both are applicable in most situations of internal or international conflict. This is reflected in the statutes of the international tribunals established to deal with war crimes in the former Yugoslavia and Rwanda and of the International Criminal Court, which give them jurisdiction over serious violations both of human rights law – as crimes against humanity – and of the Geneva Conventions for the protection of war victims and their Additional Protocols – as war crimes.

This approach has been neatly summarized by the United Nations Special Rapporteur on Kuwait, Professor Walter Kälin, in the claim that while the two bodies of law remain conceptually different in many regards they should be applied in an integrated and cumulative manner. [4] But it must be remembered that individual States may be differentially bound according to the extent to which they have ratified the relevant conventions and protocols. It may be reasonable to conclude, therefore, that the continuing separate status of the two sets of rules is generally accepted, but that they should be regarded as providing cumulative protection in situations of internal or international conflict.

Apparent differences



Professor Kälin's approach is obviously an attractive way of maximizing international protection for individuals affected by internal or international conflict. But it is not without its conceptual and practical problems. In conceptual terms there are some significant differences and some apparent incompatibility between the two branches of law. The most striking, as discussed below, may be summarized as follows:

Human rights law

The right to life is granted a high degree of protection

The right to be tried rather than detained without trial is protected

There appears to be a continuing obligation to prosecute human rights violators

The primary responsibility for ensuring compliance is imposed on the States

Law of armed conflict

The right to shoot combatants is formally recognized

The right of combatants to be detained but not tried is protected

There is a tendency to grant an amnesty when the conflict is over for most conflict-related crimes

Individuals as well as States may be held responsible for ensuring compliance

In more practical terms the separate status and formulations of the two branches of law often make it difficult to provide a straightforward account of the international rules and standards for those working on the ground in conflict situations. As a result, most practice and training manuals deal separately with the two sets of rules, leaving it to those concerned to work out which rules to seek to apply. [5]

The need for integration

If human rights law and the law of armed conflict are to be regarded as complementary, there is clearly a need to eliminate any incompatibility between them, either of principle or of application. Peace-keepers, peace-enforcers and human rights monitors on the ground cannot reasonably be expected to apply or seek to enforce conflicting sets of rules. This must be so even if there is a case for preserving the distinctive traditions of the International Committee of the Red Cross (ICRC) in discharging its mandate by persuasion and negotiation rather than by legal enforcement.

A comprehensive reformulation of the law should also incorporate, in so far as is possible, the relevant provisions of the law on refugees and internally displaced persons and the law of humanitarian intervention by international bodies, uninvolved States and non-governmental voluntary relief agencies. The status and proper treatment of refugees and internally displaced persons is a primary concern in many situations of conflict and crisis. Those from foreign countries and other agencies who go to crisis areas in an attempt to deal with the conflict and to protect those affected by it also need to know what their own status and rights are under international law. And they must understand the rules governing humanitarian intervention, whether by States or by voluntary agencies.

The purpose of this article is to suggest how such a reformulation might be approached. As the use of the term "prospectus" implies, the project is by no means complete. In some areas the way in which the apparent conflicts between the various legal rules might be resolved is relatively clear. In others there is obviously more work to be done. In this sense the analogy with a commercial prospectus is both appropriate and deliberate. The aim is to set out the essentials of a projected merger and to call for contributions from others who may be prepared to invest some time and effort in bringing the project to fruition.

The continuum from normality to full-scale armed conflict



The key to a successful merger of the two bodies of law is clearly a recognition of the legal consequences of moving along the factual continuum from normality to full-scale armed conflict. In the real world there is an obvious progression – or regression – from situations of peace and stability through those of political and social instability, involving popular protests and riots and those in which organized groups are involved in terrorism or insurgency, to those in which there is something like a front line between government and opposition forces, whether internal or external, each of which controls part of the national territory. This continuum is reflected in the rules and standards of international law.

The ordinary rules of human rights law clearly apply to situations of normality, subject only to the usual limitations in respect of national security, public order and public morality. When the level of disturbance is sufficient to pose a threat to the life of the nation, and thus to the enjoyment of rights by the main body of the population, States are entitled under human rights law to declare a state of emergency and to derogate from some of their human rights commitments if they can establish that the derogation is necessary and that the measures are proportionate to the threat to the State or to the rights of others. [6] When the situation has deteriorated into armed conflict, the rules of Article 3 common to the Geneva Conventions come into operation and impose certain basic obligations on all sides of the conflict. These are broadly similar to the non-derogable rights under the main human rights conventions, in particular the obligation to deal humanely with all those not taking part in the conflict. If the conflict escalates into a situation in which organized forces on either side exercise some control over part of the national territory, the rules under Protocol II additional to the Geneva Conventions come into operation. [7] Finally, the full range of rules of the international law of conflict, as expressed in the Geneva Conventions and Additional Protocol I, apply to international armed conflicts and certain wars of national liberation. [8]

This relationship between the degree of disturbance/conflict and the applicable international law can be portrayed in simple tabular form as follows:

Further development

This presentation is clearly over-simplified as some elements of normal human rights standards apply throughout the continuum while others are variable in relation to the degree of disturbance or the seriousness of the conflict. And it is not always clear where the rules meet or merge in respect of derogations under the main human rights conventions, the rules of Article 3 common to the Geneva Conventions and those of Protocol II. Further development of any proposal for a merger or reformulation of these standards requires a more detailed examination of specific aspects and applications of the rules under each branch of the law. In the context of this outline prospectus, however, all that can be done is to draw attention to some of the problems, some of the emerging solutions and some areas of continuing controversy.

Absolute prohibitions

There are a limited number of absolute rights or prohibitions which apply in all circumstances, however serious the conflict or crisis. In human rights law these rights, referred to as non-derogable rights, are made absolute by excluding them from any possible derogation or limitation. [9] Since in the law of conflict there is no provision for derogation, the rights are made effectively universal by their explicit inclusion in the conventions and protocols which apply to all levels of armed conflict. The most obvious example is the prohibition of torture. [10] Both branches of law also require humane treatment in all circumstances: in human rights law this is achieved by making the prohibition of "inhuman or degrading treatment or punishment" a non-derogable right along with the prohibition of torture; [11] in the law of conflict there is an explicit requirement that protected persons must be treated humanely in all circumstances. [12] There is also an absolute



prohibition of all forms of genocide which is superimposed on both branches of law under the 1948 Convention on the prevention and punishment of the crime of genocide.

In this area there is clearly some scope for a more coordinated formulation of these absolute rights and prohibitions. Human rights law might draw on some of the more explicit formulations of conflict law, such as the list of prohibitions in common Article 3 and Article 4 of Additional Protocol II. In the law of conflict the main requirement may be to make it more explicit that these absolute rights are to apply to all persons in all circumstances rather than merely to protected persons, given the complex criteria defining the status of protected person under each of the main conventions. [13] A good start has been made in this area in the formulation of absolute rights and prohibitions in the Declaration on minimum humanitarian standards ("Turku/Abo Declaration") 14 though, as will be seen, some of the terms used such as 'murder' and 'terrorism' may require further clarification.

The right to life

There is an immediately striking divergence between human rights and conflict law in respect of the right to life. In human rights law the right to life is non-derogable and is often given pride of place. [15] In the law of armed conflict the right of combatants to shoot other combatants on sight and without warning is recognized. The beginnings of a reconciliation between these apparently conflicting standards may be found in the fact that in human rights law the right to life is not absolute since it is subject to the right to use lethal force in lawful executions, in self-defence or in defence of an immediate threat to the life of others. [16] It might be argued, therefore, that under conditions of open warfare, including guerrilla campaigns, a continuing threat from combatants on either side may be presumed and would thus justify shooting on sight. This approach would have the advantage of casting doubt on the legitimacy not only of indiscriminate weapons and land-mines but also of aerial or missile attacks on forces not actively engaged and on part-time combatants while off-duty, both of which appear to be acceptable in the current interpretation of the law of conflict. [17]

It might also help to resolve the difference between the presumption in human rights law that warfare can never be lawful and the acceptance in the law of conflict that conflict is a fact of life and that its causes are irrelevant by emphasizing that in so far as individual combatants are concerned it is the immediate threat to life rather than the justification of the conflict which sets the standard. This is, incidentally, the approach to homicide in most countries' domestic law. And it would leave open the question whether those responsible for initiating or planning the campaigns on either side could be held to have acted in breach of human rights standards, as for example in the recent decision of the European Court of Human Rights in respect of the United Kingdom's actions in response to the terrorist threat in Gibraltar. [18]

Rights relating to trial and detention

There is a similar apparent divergence between human rights law and the law of armed conflict in respect of the trial and detention of combatants. Under human rights law the normal standard is that deprivation of freedom is permitted only after a fair trial for a criminal offence. [19] During states of emergency, however, derogations may be made to the normal standards for a fair trial. Detention without trial is also permitted. Under the law governing international armed conflict, on the other hand, the trial and punishment of combatants for the mere fact of having committed a hostile act is forbidden and those who are captured must be detained as prisoners of war. [20] Under common Article 3 and Additional Protocol II, however, the trial and punishment of those engaged in internal armed conflict is not ruled out provided that certain essential minimum standards for a fair trial, recognized as essential by civilized peoples, are observed. [21]



A measure of convergence between these two sets of rules may perhaps be based on the above-mentioned essential minimum standards. [22] Since any derogation under the main human rights conventions must in any case be compatible with the other international obligations of the State, they must be treated as non-derogable rights under human rights law. [23] The resulting position would be that all governments in their response to terrorism or insurgency must choose between the trial of those involved in accordance with these non-derogable standards and their detention without trial in conditions equivalent to those accorded to prisoners of war. A merged formulation along these lines would effectively resolve any apparent incompatibility between the principles of human rights and conflict law.

Political rights

There is a similar approach in both human rights and conflict law to political rights such as free expression, free association and democratic elections. All these rights are derogable under the main human rights conventions. [24] And there is nothing in the Geneva Conventions or Protocols to prevent governments or occupying powers from curtailing political rights of this kind. State practice is in line with this approach. The normal governmental response to serious internal crisis or war is to postpone elections and/or limit political freedoms of association and expression. The legitimacy of such derogations during states of emergency or war is usually accepted.

This suggests that there would be no major difficulty in drawing up a coherent set of standards for a merged restatement of the law in this area. But there may also be a case for developing the standard according to which derogations or lengthy occupations are assessed to include the extent to which the government or occupying power has made appropriate efforts to resolve its underlying political or economic problems and to restore democratic structures. [25]

Free and forced movement

International human rights law guarantees the right to freedom of movement, subject to the usual limitations in respect of national security, public order and public health and to the possibility of derogation during states of emergency. [26] In situation of crisis and conflict, restrictions on free movement, such as curfews and house arrest as a form of limited detention without trial, are regularly imposed and there are no general grounds on which justifiable and proportionate measures of that kind could be successfully challenged. In the law of conflict there is an express prohibition of the forced displacement or transfer of civilians during armed conflict other than on grounds of military necessity. [27] There is also an express prohibition of certain forms of forced eviction by armed attack, which is treated both as a war crime and a crime against humanity. [28]

As in the case of political rights there would not appear to be any major problem in combining these various standards in a merged formulation based on the twin principles of human rights and conflict law: first a general statement of the right to free movement, which may be curtailed only on specified grounds directly and proportionately related to the degree of crisis or conflict and subject to appropriate legal safeguards; and second a more tightly framed prohibition of forced movement or transfer except in the most restricted circumstances for the better protection of the lives of those affected and with an express right to return as soon as circumstances permit.

Refugees and internally displaced persons

Dealing with mass population movements, whether they occur for fear of attack or by actual force of arms, is one of the major concerns during acute crises and conflict. In cases where those affected have fled across international boundaries, they may be entitled to formal refugee status under the 1951 Convention relating to the status of refugees and the 1967 Protocol. But this is limited to cases in which it can be established that their flight was the result of a well-founded fear



of persecution. [29] And even when such formal status is granted, the principal right of refugees is that they will not be returned to their country of origin (the right of *non-refoulement*). There is no formal right of settlement in the country of refuge or of resettlement elsewhere. The Convention does prescribe valuable standards of treatment and there is an obligation to cooperate with the United Nations High Commissioner for Refugees (UNHCR). But the mass influxes which typically occur during acute crises and conflicts render the individualistic approach of the 1951 Convention, which was drafted with individual asylum seekers in mind, highly problematic. Any reformulation of the rules would need to take into account and develop the concept of temporary protection, which is increasingly being relied on in cases of mass flight.

There are two significant categories of *de facto* refugees who do not qualify for formal refugee status under the 1951 Convention. The first are those who cannot establish a well-founded fear of persecution, generally referred to as non-status refugees. The second are those who have not crossed an international boundary, generally referred to as internally displaced persons. Neither group is entitled to any special protection other than that which is generally available to the civilian population under human rights law or the law of conflict. They do, however, fall under the functional responsibility of the UNHCR as well as of the other organizations that become involved in situations of forced displacement.

There is therefore a pressing need for a clear statement of the specific rights of all these groups. An initial account of the rights of internally displaced persons under both human rights law and the law of conflict has been prepared at the request of the UN Secretary-General. [30] But there is less clarity regarding the precise rights of non-status refugees other than that which can be deduced by analogy from those of status refugees. This lack of clarity has caused major problems in some refugee camps, notably those in (former) Zaire following the conflict in Rwanda. A coherent restatement of the existing rules and an indication of how best they might be developed to take account of the realities of mass movements of this kind is one of the most urgent requirements in this area.

Enforcement against involved States and/or individuals

A further major difference between human rights law and the law of conflict is that the obligations under the main human rights conventions are imposed exclusively on States while those under the Geneva Conventions and Protocols are binding on both States and on individuals, and in certain circumstances on organized paramilitary groups. This distinction has in recent years given rise to controversy as to whether non-State forces engaged in internal conflicts and liberation struggles can be held responsible for human rights violations. The prevailing view among most international non-governmental organizations is that opposition forces can properly be held responsible only for breaches of the law of conflict and that they cannot be accused of human rights violations. [31] But it is difficult to justify this distinction in the public arena in other than formalistic legal terms. And the fact that the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda and of the new International Criminal Court provide for individual responsibility for crimes against humanity, which can be viewed as equivalent to serious human rights violations, as well as for war crimes, makes it even more difficult to justify the distinction.

There is therefore a strong case for extending responsibility for serious human rights breaches and violations of the law of conflict to all organized groups in situations of conflict. As in the case of responsibility under the Geneva Conventions and Protocols, this would require formulations taking account of the degree of control exercised by organized opposition groups over parts of the national territory and/or sections of the population. A similar approach is already applied under the main human rights conventions in respect of State responsibility for violations by non-State forces. [32] There is certainly no good reason in principle why a different rule should be



applied under the two bodies of law. The further development of individual and group responsibility under the jurisdiction of the International Criminal Court may be the simplest means of pursuing this objective. But it may also be possible to argue that since the provisions of the Universal Declaration of Human Rights are widely regarded as having achieved the status of customary international law, any alleged difficulty in holding non-State bodies responsible for breaches of covenants which only States can ratify may be avoided.

Impunity and/or amnesty

There is a related and equally controversial divergence between human rights law and the law of conflict as regards the issue of impunity or amnesty for serious human rights violations and war crimes. Human rights lawyers typically take the view that all serious human rights violations should result in the prosecution and punishment of the individuals responsible for them and they argue strongly against any form of impunity. This approach has been given some backing by international human rights courts and commissions in decisions requiring States to investigate and bring to justice those responsible for disappearances and other serious human rights violations. [33] The law of conflict, on the other hand, favours the release of prisoners and the granting of amnesties to all combatants on the termination of hostilities. There is an express provision in Protocol II calling on the authorities in power to endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict. [34] This provision, however, must be read in conjunction with the standard articles in the main Geneva Conventions which require all States to provide effective penal sanctions against grave breaches of the Conventions and not to absolve themselves or other parties from any liabilities incurred as a result of such grave breaches. [35]

One possible approach to these apparently conflicting provisions is to distinguish between grave breaches for which no amnesty should be granted and other breaches and/or criminal offences related to the conflict, such as charges of homicide against members of non-State forces for their actions during the conflict, for which combatants should not be penalized. The practice of most States following the termination of hostilities in both international and internal conflicts, on the other hand, is to grant amnesty for all offences arising from the conflict, though in some recent cases this has been linked to the appointment of truth commissions in order to ascertain and publish the facts about serious and systematic violations by both State and non-State forces during the conflict. [36]

There is currently no agreement between human rights lawyers who argue against all forms of impunity and politicians who argue that national reconciliation may require some means of bringing an effective end to criminal proceedings for offences committed during the conflict, whether by the agreement by the parties to a negotiated peace settlement [37] or by international arbitration. Some measure of compromise might perhaps be reached by developing international standards under which democratically mandated amnesties – as opposed to those granted by the violators to themselves – might be legitimated, provided that appropriate compensation is not denied to victims. A distinction might also be drawn between offences committed by those responsible at the highest level for initiating or planning the violations and those responsible at lower levels for their implementation for whom an amnesty might be more readily agreed. But these are matters on which there is as yet insufficient international consensus upon which to base any agreed reformulation of the law.

Rights and obligations of intervening States and agencies

A final crucial issue on which both human rights law and the law of conflict are silent is the question of humanitarian intervention by external parties. There is an increasing expectation of intervention by external States and voluntary agencies to protect and relieve the suffering of



those affected by internal crises and conflicts. But the legal principles on which such humanitarian intervention might be based remain unclear. The UN Charter provides for the authorization of forcible intervention by the Security Council only where international security is threatened. [38] Most recent United Nations peace-keeping operations have therefore been mounted with the consent of the States or governments concerned. Action taken by the ICRC in internal conflicts is also based on negotiation with the relevant government or insurgent party, though the express provisions for its involvement in international conflicts under the Geneva Conventions and Protocols provide a formal basis for its operations. [39] And non-State aid agencies are wholly dependent on consent from State authorities. But individual States and regional interstate organizations in both Europe and Africa have intervened in a number of recent conflicts without clear UN authorization in order to protect individual or communal human rights or to prevent grave breaches of conflict law. [40]

This is one of the most controversial and politically sensitive areas of international law and there is no immediate prospect of international agreement on a clear set of rules. Even if international consensus cannot be reached on a formal right of intervention in such cases, however, there is clearly a need for a more coherent formulation of principle and practice for all those involved in such action for the protection of the victims of both internal and international crises and conflicts. This should include guidelines on the status and rights of military, police and other governmental and voluntary personnel who are working on the ground in situations of crises and conflict. Some of the principles and rules may be deduced by analogy from the mandates and working practices of international agencies, notably the ICRC and the UNHCR. But a considerable body of work remains to be done in this area.

Conclusions

The main objective of this outline prospectus has been to argue that the time has come for a coherent restatement of international law and practice in this area. Insofar as is possible this should be based upon a merged reformulation of the established rules of human rights law and the law of conflict along the lines set out above. In other areas it may be possible only to suggest new rules or guidelines based on current international, State and voluntary practice. But it is clear that the long-standing separation between international human rights law and the international law of conflict has outlived its usefulness and that experts in both areas need to come together to agree on those issues on which there is already effective consensus and to resolve the continuing differences in their respective approaches. It is hoped that this initial formulation of the project, despite its generality, will contribute in some way to the initiation of more detailed work over the coming years so that in the new millennium it will no longer be necessary to talk or write about two conflicting bodies of international law in the field of humanitarian intervention.

* * * * *

Notes

1. There is a huge range of literature on this and many other issues discussed in this article; references will be made only to those from which a relevant point is derived directly.
2. In this article the term "humanitarian law" will be reserved for the law governing humanitarian intervention; the rules in the Geneva Conventions and Protocols will be referred to as the "law of armed conflict".
3. D. Fleck (ed.), *The Handbook of humanitarian law in armed conflicts*, Oxford University Press, Oxford, 1995.
4. W. Kälin (ed.), *Human rights in times of occupation: the case of Kuwait*, Stämpfli, Berne, 1994, pp. 26-27.
5. See, e.g., *Human rights and law enforcement: A manual on human rights training for the police*, United Nations Centre for Human Rights, 1997; C. de Rover, *To serve and protect: human rights and humanitarian law for police and security forces*, International Committee of the Red Cross, Geneva, 1998.



6. International Covenant on civil and political rights (ICCPR), Art. 4; (European) Convention for the protection of human rights and fundamental freedoms (ECHR), Art. 15.
7. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), Art. 1.
8. Art. 1 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) extends the application of the Geneva Conventions of 1949 to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination".
9. ICCPR, Art. 4 (2) ; ECHR, art. 15 (2).
10. First Geneva Convention, Art. 50; Second Geneva Convention, Art. 51; Third Geneva Convention, Art. 130; Fourth Geneva Convention, Art. 147; Protocol I, Art. 85; Protocol II, Art. 4 (2).
11. ICCPR, Art 7; ECHR, Art. 3.
12. First Geneva Convention, Art. 3 and 12 ; Second Geneva Convention, Art. 3 and 12; Third Geneva Convention, Art. 3 and 13; Fourth Geneva Convention, Art. 3 and 27; Protocol II, Art. 4.
13. First Geneva Convention, Art 13; Second Geneva Convention, Art. 13; Third Geneva Convention, Art. 4; Fourth Geneva Convention, Art. 4.
14. "Declaration of minimum humanitarian standards", reprinted in UN Doc. E/CN.4/1996/80 and *International Review of the Red Cross*, No. 282, May-June 1991, p. 328.
15. ICCPR, Art. 6; ECHR, Art. 2.
16. ECHR, art 2; United Nations Basic Principles on the use of force and firearms by law enforcement officials, 1990, Art. 9.
17. See, e.g., R. Goldman, "International humanitarian law : Americas Watch's experience in monitoring internal armed conflict", *American University Journal of International Law and Policy*, vol. 9, 1993, p. 75.
18. *McCann v United Kingdom*, European Human Rights Reports, vol. 21, 1996, p. 97.
19. ICCPR, Arts. 9 and 14; ECHR Arts 5 and 6.
20. Third Geneva Convention, Arts. 82-108.
21. Common Article 3 (1) (d); Protocol II, Art. 6.
22. See S. Stavros, "The right to a fair trial in emergency situations", *International and Comparative Law Quarterly*, vol. 41, 1992, p. 343.
23. ICCPR, Art 4 (1).
24. ICCPR, Art. 19, 21-22 and 25; ECHR Art. 10-11 and Protocol 1, Art. 3. Article 23 of the American Convention on human rights, which makes the right to political participation non-derogable, is out of line.
25. T. Hadden, "Human rights abuses and the protection of democracy during states of emergency", Cairo Conference on Democracy and the Rule of Law, 1997 (forthcoming).
26. ICCPR, Art. 12; ECHR, Protocol 4, Art. 2.
27. Fourth Geneva Convention, Art 49; Protocol II, Art. 17.
28. Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, 1968, Art. 1 (b).
29. Art. 1 (A) (2).
30. Report of the Special Representative of the Secretary-General on internally displaced persons, UN Doc.



E/CN.4/1998/53 (Deng Report).

31. See Goldman, *op. cit.* (note 17).

32. See the judgement of the Inter-American Court of Human Rights in *Velasquez Rodriguez v Honduras*, *Human Rights Law Journal*, vol. 9, 1988, p. 212.

33. See, for example, the opinion of the Human Rights Committee in *Suarez de Guerrero v Columbia*, No. 45/1979 (1982).

34. Art. 6 (5).

35. First Geneva Convention, Arts. 49-51; Second Geneva Convention, Arts. 50-52; Third Geneva Convention, Arts. 129-131; Fourth Geneva Convention, Arts. 146-148.

36. Amnesties linked with various forms of truth commissions have been implemented as part of political settlements following almost all the recent conflicts in Latin America and in South Africa.

37. See the decisions of the Inter-American Commission on Human Rights that the amnesty laws in Argentina and Uruguay were contrary to the American Convention on Human Rights : Report No. 28/92 in respect of Argentina and Report No. 29/92 in respect of Uruguay, *Human Rights Law Journal*, vol. 13, 1992, p. 336. But a challenge to the amnesty powers of the Truth and Reconciliation Commission in South Africa on the ground that they were contrary to the human rights included in its new Constitution was rejected on the grounds that it had been adopted as part of the peace settlement, *AZAPO v President of the Republic of South Africa* [1996][4], *South African Law Reports*, p. 562.

38. United Nations Charter, Chapter VII.

39. First Geneva Convention, Art. 9; Second Geneva Convention, Art. 9; Third Geneva Convention, Art. 9; Fourth Geneva Convention, Art. 10; Protocol I, Art. 81; Protocol II, Art. 18.

40. As, for example, the recent interventions in Sierra Leone under the auspices of the Organization of African States and in Kosovo under the auspices of the Organization for Security and Cooperation in Europe



SUPPLEMENTARY READING 12

Guiding Principles on Internal Displacement

by Jean-Philippe Lavoyer

A few comments on the contribution of international humanitarian law

The very intense international debate that has taken place in recent years on the subject of internally displaced persons has recently undergone a major development — the drafting of the Guiding Principles on Internal Displacement (hereinafter referred to as the "Guiding Principles"). The distinguishing feature of these Guiding Principles is that they incorporate elements of three branches of public international law in a single document: international humanitarian law, human rights law, and refugee law. This combination calls for special comment. The aim of this article is to place the Guiding Principles in a wider context and to highlight the importance of international humanitarian law and the role of the ICRC with regard to internally displaced persons. In so doing, the author examines both the advantages and the shortcomings of a document that covers a very broad range of contexts, whereas existing international law contains a number of rules which are precise but apply only to specific situations.

Internally displaced persons and international humanitarian law

Identifying the link between internal displacement and international humanitarian law is a simple matter, for persons internally displaced as a result of armed conflict are protected under the terms of this law. The link is in fact a very close one, since armed conflicts are one of the major causes of displacement.

While humanitarian law affords protection to the internally displaced, it is important to bear in mind that its scope extends a great deal further. Indeed, its aim is primarily to prevent displacement, and many forced population movements could be avoided if the rules of humanitarian law — and human rights law for that matter — were duly respected.

International humanitarian law seeks first and foremost to protect the civilian population from the harmful effects of war. The 1977 Protocols additional to the 1949 Geneva Conventions, which reaffirm and expand the provisions of the four Conventions for the protection of war victims, contain numerous rules setting standards of conduct for the warring parties in order to spare the civilian population as a whole. Some of these rules afford general protection, while others relate more specifically to displacement.

With 188 States Parties, the Geneva Conventions of 12 August 1949 are universal. A total of 150 States are bound by Additional Protocol I, which relates to international armed conflicts, and 142 States by Additional Protocol II, which concerns non-international armed conflicts [1]. These figures are very encouraging and bear witness to the importance that the international community attaches to the ideals upheld by humanitarian law.

Preventing displacement in general



As regards the conduct of hostilities, the rules of humanitarian law stipulate that, in the event of armed conflict, it is imperative at all times to distinguish between the civilian population and combatants, and between civilian objects and military objectives [2]. Consequently, only attacks against combatants and military objectives [3] are lawful. It is expressly prohibited to attack civilians — insofar as they do not take an active part in the hostilities — or to launch indiscriminate attacks which strike military objectives and civilians without distinction [4].

The Additional Protocols also provide for protection of objects indispensable to the survival of the civilian population (such as foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies, and irrigation works), cultural objects and places of worship, works and installations containing dangerous forces (dams, dykes and nuclear power stations), and the natural environment. [5]

In order to strengthen such protection, humanitarian law requires belligerents to take numerous precautions when planning or executing an attack. They must always ensure that their objective is indeed a military one [6].

Protection of the civilian population against the effects of hostilities is thus assured in the event of both international and non-international armed conflicts.

Furthermore, humanitarian law requires that persons who take no active part or have ceased to take an active part in the hostilities shall be treated humanely and without any adverse distinction. The purpose of this requirement is to protect civilians above all. Article 3 common to the four Geneva Conventions expressly prohibits acts of violence to life and person, the taking of hostages, outrages upon personal dignity and the passing of sentences without previous judgment pronounced by a regularly constituted court [7]. It also provides that the wounded and sick shall be collected and cared for. Additional Protocol II of 1977 further consolidates these prohibitions. [8]

One of the advantages of humanitarian law over human rights law is that, in internal armed conflicts, its provisions — in this instance, common Article 3 and 1977 Additional Protocol II — are also binding on armed opposition groups. Moreover, there can be no derogation from the rules of international humanitarian law.

Displacement is expressly prohibited

Some rules of humanitarian law deal directly with the issue of displacement. For example, in situations of internal conflict it is expressly forbidden to compel civilians to leave their place of residence unless the security of the persons involved or imperative military reasons so demand. [9]

Furthermore, the inhabitants of occupied territory may not be expelled from such territory by the Occupying Power [10]. In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs. [11]

Protection of internally displaced persons



Internally displaced persons do not fall into a separate category under humanitarian law. They are included in the term "civilian population", and thus benefit from all the provisions that afford protection to civilians (including those mentioned above).

All armed conflicts cause a degree of suffering among civilians, even when humanitarian law is fully respected. Strict compliance with the law would considerably reduce the number of victims and hence the number of forced population movements, meaning that there would be fewer internally displaced persons and refugees.

The ICRC and internally displaced persons

The States have entrusted the ICRC with the task of monitoring respect for international humanitarian law. As the promoter and custodian of this body of law, the organization endeavours to ensure compliance with its provisions in times of peace as well as war. In peacetime, the States' primary responsibility in this respect is to provide instruction in humanitarian law for their armed forces — for whom it is principally intended — and to adopt measures for implementation of the law at the national level, particularly with a view to ensuring the prosecution of war criminals. [12]

When an armed conflict breaks out, the ICRC reminds the belligerents of their obligations, stemming mainly from the Geneva Conventions of 1949 and their Additional Protocols of 1977. It also seeks to establish a constructive dialogue with them, based on mutual trust. For this reason the ICRC prefers persuasion over denunciation as a working method. In the event of serious violations of humanitarian law, however, and if its policy of discretion fails to put a stop to such violations, the ICRC reserves the right to denounce them. The ICRC also reminds States of their responsibility to ensure respect for humanitarian law, as stipulated in Article 1 common to the four Geneva Conventions and to Additional Protocol I. [13]

In the field, the ICRC performs a variety of tasks, which include providing protection and assistance for the civilian population, conducting health-related activities (such as war surgery, supplying drinking water, rehabilitation), visiting prisoners of war and security detainees, and restoring contact between family members separated by war. [14]

The ICRC's understanding of the term "civilian population" is the same as that defined in humanitarian law. It thus encompasses all civilians, without any distinction. Internally displaced persons are therefore obviously covered by the ICRC's mandate to afford protection and assistance to the civilian population, and the ICRC deploys large-scale activities to help the displaced all over the world. Almost every one of its operations — in Colombia, Uganda, Sierra Leone, the Horn of Africa, Sri Lanka, Afghanistan and the Caucasus, to name but a few — includes a component that deals with displaced persons.

While the ICRC strives to tend to the needs of all victims of armed conflict and internal disturbances, it is well aware of the extreme vulnerability of internally displaced persons, who, like refugees, have generally been forced to leave everything behind in their flight.

While concern for internally displaced persons is indeed crucial, there are obviously other categories of people whose needs may be just as pressing and just as acute — for example the wounded and the sick, children separated from their families, persons deprived of their freedom, and all those who find themselves trapped in the fighting and who want to flee but are unable to do so. A global view of the different needs and an impartial response to them will prevent any unjustified distinction between the various categories of victims.



The ICRC has never attempted to define the term "internally displaced person", simply because all displaced persons fall within the category "civilian population". In terms of legal protection, it is immaterial whether an individual is displaced or not, for all civilians — whether they are living in their own homes, staying temporarily with friends or relatives, admitted to hospital, or forced to flee their homes — are equally entitled to protection.

The international debate on internally displaced persons

The debate on internally displaced persons intensified after the issue was submitted to the Commission on Human Rights, and following the appointment in 1992 of Francis M. Deng as the Representative of the UN Secretary-General on Internally Displaced Persons. Given the increasingly widespread incidence of the problem, such concern for the plight of the displaced was entirely justified.

From the outset, the ICRC made a point of taking an active part in the debate. It maintains a regular dialogue with the Secretary-General's Representative; it has also exchanged views on the matter with other humanitarian players, particularly the Office of the United Nations High Commissioner for Refugees; and it has participated in numerous discussions in several fora, including the UN General Assembly and the Commission on Human Rights. The ICRC is also involved in the work of the Inter-Agency Standing Committee, which attaches great importance to internally displaced persons, and has placed one of its senior staff members at the disposal of the United Nations Office for the Coordination of Humanitarian Affairs to strengthen coordination in matters relating to the internally displaced.

As part of its contribution to the debate, in October 1995 the ICRC organized a three-day symposium in Geneva on internally displaced persons, at which experts discussed the operational and legal aspects of the problem.

The ICRC followed with great interest the work of the Secretary-General's Representative and a team of international legal experts to prepare a compilation and analysis of legal norms for the protection of internally displaced persons (hereinafter referred to as the "Compilation and Analysis") [15]. This reference document, which was submitted to the Commission on Human Rights in 1996, gave a clearer picture of the rules of human rights law and international humanitarian law (and, by analogy, refugee law) pertaining to internally displaced persons. The conclusion was that existing law provides substantial coverage of the needs of the internally displaced; there were, however, shortcomings and a need for clarification in some areas. It was also considered advisable to make some of the general rules more explicit so as to respond more effectively to the specific needs of displaced persons.

The most serious shortcomings were to be found in contexts not covered by humanitarian law (such as internal disturbances), as a number of human rights may be waived in emergency situations. It should further be pointed out that international law fails to make sufficient provision for the return of internally displaced persons (i.e., the right to return home in safe and dignified conditions) or the right to seek refuge in a safe place. Furthermore, it does not provide for the restitution of property lost as a consequence of displacement or stipulate the right of the displaced to obtain official documents (which are often required to gain access to public services).

To give a more "operational" slant to the Compilation and Analysis, Francis Deng undertook to draw up the Guiding Principles on Internal Displacement, which were drafted between 1996 and 1998 with the assistance of a small group of experts. The ICRC was invited to contribute to the



process and readily agreed to take part. Working sessions were held in Geneva in October 1996 and June 1997, and a consultation of experts took place in Vienna in January 1998, at the invitation of the Austrian government. The Guiding Principles were finalized thereafter.

The UN Secretary-General submitted the Representative's report, along with the Guiding Principles, to the Commission on Human Rights for consideration at its April 1998 session [16]. The Commission discussed the issue and took note of the report and the Guiding Principles. It decided to keep the subject on its agenda and to extend the Representative's mandate. [17]

Guiding Principles on Internal Displacement

The Guiding Principles are an important document, and some of its features deserve special comment.

General approach to the problem

As a general rule, protection of the individual can be viewed either in terms of situations or in terms of categories of persons. In the first instance, protection is afforded to persons caught up in certain types of situation. Thus humanitarian law, which applies in either international or internal armed conflicts, sets out an elaborate system of protection of the individual that is designed to meet specific needs arising from the situations covered. In such contexts, certain categories of persons may be entitled to special protection. Such would be the case, for example, of prisoners of war or the inhabitants of occupied territory.

In the second instance, provision may be made to protect specific categories of individuals in a variety of situations. This is the case, for example, of the Convention on the Rights of the Child. The advantage of this approach is that it focuses on protecting one category of persons, regardless of the situation in which they find themselves. The drawback is that it may fail to cover all their needs for protection, since it is impossible to take detailed account of all the rules governing the different situations that may arise.

The Guiding Principles provide for the second form of protection described above, and their strongest point is that they address a wide range of needs arising from diverse situations. However, it should be borne in mind that they do not necessarily provide the same level of protection as that afforded by the various bodies of international law.

Definition of internally displaced persons

The introduction to the Guiding Principles contains a very broad definition of the term "internally displaced person". While the definition does not confer any legal status upon the persons covered, it serves to specify the document's field of application. Laudable though this endeavour may be, it does, however, entail the risk of diminishing the scope of the protection to which the civilian population is entitled. Indeed, in an armed conflict internally displaced persons form part of the civilian population — whether the population in question is displaced or not. According to the definition, some people might not qualify as internally displaced persons if the reasons for their displacement are unclear. This means that they might not be covered by the Guiding Principles, but they would be entitled to protection under international humanitarian law.

The Guiding Principles endeavour to counter this shortcoming by stipulating, in Principle 1, that internally displaced persons are on an equal footing with the rest of their country's population.



Care must, however, be taken not to leap to conclusions when interpreting the definition of internally displaced persons.

The definition is somewhat arbitrary, and hence so are overall statistics regarding internally displaced persons. Caution must be exercised in regard to the figures quoted, as they do not always appear reliable. The ICRC for its part has consistently refrained from estimating the number of internally displaced persons worldwide.



Scope of the Guiding Principles

The document fully covers the problem of internal displacement. It deals with the various stages and issues involved, i.e., protection of and humanitarian assistance to the displaced, and their return, resettlement and reintegration.

The Guiding Principles also seek to prevent displacement by reaffirming the obligation to respect and ensure respect for human rights and international humanitarian law (Principle 5).

Legal nature of the Guiding Principles

The purpose of the document is neither to modify nor to replace existing law, as is clearly stated in Principle 2, paragraph 2:

"These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. (...)"

Although the Guiding Principles can thus be viewed as falling within the province of soft law, they contain numerous rules that form part of treaty law and that are therefore legally binding. It is crucial to bear this in mind and to invoke first and foremost the relevant binding rules, such as the detailed provisions of international humanitarian law in situations of armed conflict.

Those for whom the Guiding Principles are intended

As stated in their introductory section, the Guiding Principles are intended primarily for States, armed opposition groups, intergovernmental and non-governmental organizations, and the Secretary-General's Representative in carrying out his mandate.

While the document may indeed be useful for governmental and non-governmental organizations and the

Secretary-General's Representative, the Guiding Principles are intended first and foremost for governments and armed opposition groups, which are also bound by international humanitarian law. Indeed, both are responsible for ensuring respect for humanitarian law, which plays a primary role in matters relating to forced population movements. Principle 3 states, in a more general fashion, that national authorities have the primary duty to provide protection and assistance to internally displaced persons.

The ICRC, along with other organizations, has made it known that it intends to inform its delegates of the contents of the Guiding Principles and to promote them. When faced with a situation of internal displacement in an armed conflict, the ICRC invokes the principles and rules of humanitarian law. The Guiding Principles could nonetheless serve a useful purpose in contexts where humanitarian law does not make specific provision for certain needs (such as the return of displaced persons in safe and dignified conditions). The Guiding Principles could also play a very useful role in situations not covered by international humanitarian law, such as disturbances or sporadic violence.

The principle of non-discrimination

The Guiding Principles are based on the principle of non-discrimination (referred to in Principles 1, 2, 4, 18, 22 and 29 in particular). This principle is the cornerstone of both human rights and humanitarian law.





Protection of women and children

The Guiding Principles rightly place special emphasis on the protection of women and children, as they are particularly vulnerable. After setting out the general rule (Principle 4), the document deals with the recruitment of children in armed forces and their participation in hostilities (Principle 13), and the right of displaced children to receive education (Principle 23). The document stipulates that special attention shall be paid to women, particularly in terms of their health needs (Principle 19) and education (Principle 23).

Restoring family ties

Principles 16 and 17 deal with the issue of missing persons and the reunification of dispersed family members. They refer to the right of internally displaced persons to be informed of the fate and whereabouts of relatives reported missing and to be reunited with them as quickly as possible. In both cases the Guiding Principles stipulate that the authorities concerned shall cooperate with the humanitarian organizations engaged in such tasks. Indeed, tracing missing persons, conveying messages between separated family members and arranging for family reunifications form part of the traditional activities conducted by the ICRC.

Assistance and protection

One entire section of the Guiding Principles (Principles 24-27) is based on the rules of humanitarian law providing for relief to be delivered to the civilian population in an impartial manner. The document further reaffirms that offers of services made by humanitarian organizations shall not be regarded as interference in a State's internal affairs nor arbitrarily refused.

The Guiding Principles also contain provisions aimed at affording better protection to internally displaced persons. Principle 27, for example, stipulates that:

"International humanitarian organizations (...) when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. (...)"

The decision to link assistance and protection is a judicious one indeed, for no operation strictly limited to the delivery of relief supplies can be fully effective. This confirms the ICRC's long-standing view that the concepts of assistance and protection are closely linked, if not virtually indissociable. In practice, assistance very often serves as a means of protecting the population concerned.

The Guiding Principles nonetheless stress the special role and responsibilities of organizations that have been entrusted with a specific mandate to afford protection:

"The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States."

This refers in particular to the mandate that the States have conferred upon the ICRC. Lastly, Principle 27 states that humanitarian organizations and other players should respect the relevant international standards and codes of conduct. This includes, for example, the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental



Organizations (NGOs) in Disaster Relief [18], which has been endorsed by a large number of NGOs.

The right to leave one's own country

The Guiding Principles stipulate that all persons have the right to leave their country and, in particular, to seek asylum in another country (Principles 2 and 15). This is an important reminder, for one tends to forget that in some instances the option to flee to another country can save lives. This right is all the more crucial as attempts are sometimes made to prevent displacement so as to avoid creating refugee movements.

Return of internally displaced persons

An entire section of the Guiding Principles (Principles 28-30) is devoted to the return of internally displaced persons. This aspect of the problem deserves special attention, for in practice it has often been relegated to the background. The document takes up the principle of voluntary repatriation, as stipulated in refugee law. It also reaffirms the principle that internally displaced persons have the right to return in safety and with dignity, and that it is the duty of the competent authorities to assist them. Furthermore, the authorities must help the displaced to recover the property and possessions they left behind or, when such recovery is not possible, to obtain appropriate compensation or another form of just reparation.

Principle 15 reaffirms what is tantamount to the principle of non-refoulement: it specifically protects internally displaced persons against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

Towards a development in the law?

What of the proposal to develop a legally binding instrument on the subject of internally displaced persons? Appealing though the idea may be at first glance, it undeniably has certain disadvantages. Quite aside from whether such a proposal would be politically acceptable to States, a new instrument of this kind might well fall short of, and thus weaken, existing law. Generally speaking, the main problem facing civilians today is blatant lack of respect for the most fundamental rules. The question is therefore whether the introduction of new rules would serve any useful purpose. Such lack of respect can sometimes be attributed to ignorance, but it mostly stems from a deliberate lack of political will to apply humanitarian law.

This implementation problem is particularly acute in contexts where ethnic or religious concerns are the overriding issue and provoke a spate of violence aimed first and foremost at civilians. A prime example is the policy of "ethnic cleansing", in which humanitarian law no longer holds any sway. Enormous difficulties also arise in situations where State structures have collapsed, where the chains of command — so vital to ensuring respect for humanitarian law — are lacking, and where the political vacuum has been filled by disorganized bands. In such cases, little heed is paid to the rules of law.

In the face of these considerable challenges, the development of new legal instruments would not appear a priori to be the answer to the problem; moreover, the proliferation of new rules might weaken existing law.

Rather than developing new instruments, the international community should, in our opinion, focus its efforts on promoting existing treaties and advancing respect for international



humanitarian law among parties to conflicts. For example, States should be reminded of their responsibility to "ensure respect" for the Geneva Conventions and their Additional Protocols, as stipulated by Article 1 common to the four Geneva Conventions.

That being said, humanitarian law is part of a dynamic process, as evidenced by the recent bans on blinding laser weapons and anti-personnel landmines.

Conclusion

The international debate on the subject of internally displaced persons has undeniably advanced their cause. In particular, the work of the Secretary-General's Representative has served as a catalyst and has brought about a deeper understanding of their plight and needs. The Compilation and Analysis and, more recently, the Guiding Principles have identified and clarified the rules for the protection of internally displaced persons.

The Guiding Principles are a working tool that serves to reaffirm and clarify existing law. It is to be hoped that they will help sensitize States (as well as warring parties, in the event of armed conflict) to the distressing problem displacement, and guide them in their action.

The text has the merit of combining, in a single document, elements from different branches of international law, and makes it possible to address the numerous needs of internally displaced persons in a comprehensive fashion. However, it is necessary to remember that such an approach also entails a number of risks — particularly as regards the definition of the term "internally displaced person" — and to bear in mind the many rules of international humanitarian law that serve to protect the civilian population as a whole in the event of armed conflict.

Notes:

Original: French

1. As at 1 July 1998.
2. Additional Protocol I, Art. 48.
3. The term "military objectives" is defined in Article 52 of Additional Protocol I.
4. Additional Protocol I, Art. 51, and Protocol II, Art. 13.
5. Additional Protocol I, Arts 53-56, and Protocol II, Arts 14-16.
6. Additional Protocol I, Art. 57.
7. According to the International Court of Justice, Article 3 common to the Geneva Conventions contains rules that reflect elementary considerations of humanity and is applicable in all armed conflicts (*Nicaragua v. USA*, Judgment, 27 June 1986, para. 218).
8. Additional Protocol II, Arts 4-6.
9. Additional Protocol II, Art. 17.
10. Fourth Geneva Convention, Art. 49.
11. Fourth Geneva Convention, Art. 45.
12. The ICRC's Advisory Service on International Humanitarian Law provides States with technical assistance and supports their efforts to implement humanitarian law at the national level.
13. "The High Contracting Parties undertake to respect and to ensure respect for the present Convention [this Protocol] in all circumstances."
14. The Geneva Conventions confer upon the ICRC the right to visit prisoners of war and civilian internees (Arts 126 and 143 of the Third and Fourth Conventions, respectively). Furthermore, the Conventions and the Statutes of the International Red Cross and Red Crescent Movement grant the ICRC a right of humanitarian initiative.
15. UN doc. E/CN.4/1996/52/Add.2 of 5 December 1995.
16. UN doc. E/CN.4/1998/53/Add.2 of 11 February 1998.
17. Resolution 1998/50 of 17 April 1998. See below, pp. 545-556.
18. Text reproduced in IRR, No. 310, January-February 1996, pp. 119 ff.





SUPPLEMENTARY READING 13

Punishing War Crimes : International Criminal Tribunals

International Red Cross Committee

International humanitarian law seeks to protect the victims of armed conflict and to limit the means and methods of warfare. Serious violations of this law constitute war crimes. Those responsible for such crimes must be tried and punished. In the 1990's two international criminal tribunals, the first for half a century, were established. These have the power to try war crimes committed in specific conflicts. Negotiations for the creation of a permanent international court resulted in the adoption of the Rome Statute of 1998.

Regional or international courts, such as the International Court of Justice, are an important means of resolving disputes and ensuring respect for international law. Such courts generally have jurisdiction only over States. With some exceptions, such as the Nuremberg Tribunal established after the Second World War, the conduct of individuals has been a matter for national courts. However important moves have been made in establishing international criminal courts to try and punish individuals who have committed certain serious offences.

1. The Ad Hoc Tribunals

The United Nations Security Council, acting under Chapter VII of the United Nations Charter, has established two international criminal tribunals. These tribunals are "ad hoc" - they have been set up to punish crimes committed in relation to two specific contexts: the former Yugoslavia and Rwanda.

The Hague Tribunal

The International Criminal Tribunal for the former Yugoslavia, based in the Hague (Netherlands), was established in February 1993 by Security Council Resolution 808. Its jurisdiction is limited to acts committed in the former Yugoslavia since 1991 and covers four categories of crimes:

- (i) grave breaches of the Geneva Conventions of 1949
- (ii) violations of the laws and customs of war
- (iii) genocide and
- (iv) crimes against humanity. These crimes are defined in the Tribunal's Statute.

The Tribunal has issued indictments, formal accusations of crimes, against a large number of individuals. While most of these individuals remain at large, some have been detained and put on trial. The tribunal has already delivered a number of decisions on procedural and substantive issues. The first trial was concluded in May 1997.



The Arusha Tribunal

The International Criminal Tribunal for Rwanda, based in Arusha (Tanzania), was established in November 1994 by Security Council Resolution 955. Its jurisdiction is limited to acts committed in Rwanda, or by Rwandan nationals in neighbouring States, during 1994. It covers three categories of crimes as defined in the Tribunal's Statute:

(i) genocide

(ii) crimes against humanity and

(iii) violations of common Article 3 of the 1949 Conventions and Additional Protocol II (these set out rules applicable to non-international armed conflicts).

The Arusha tribunal has also issued a number of decisions on legal issues. The first trial by the tribunal began in January 1997.

Each Tribunal has eleven judges, elected by the United Nations General Assembly from a list submitted by the Security Council, as well as a registrar, responsible for administration, appointed by the United Nations Secretary-General. The Tribunals share the same prosecutor, appointed by the Security Council on the nomination of the United Nations Secretary General, and the same appeals chamber.

2. Moves to a Permanent International Criminal Court

Since the 1950s the United Nations has been considering the establishment of a permanent international criminal court having jurisdiction over crimes regardless of when or where they were committed. Discussions were relaunched in 1994 when the United Nations General Assembly set up a committee to review a draft statute for an international criminal court, succeeded by a Preparatory Committee for the Establishment of a Permanent International Criminal Court. Discussions within the Preparatory Committee led to a Diplomatic Conference in Rome in 1998 which adopted the Statute of an International Criminal Court.

International Courts and States

States have clear obligations to cooperate with the Hague and Arusha Tribunals. This includes, where necessary, the enactment of legislation to ensure the collection of evidence and the arrest and transfer of those accused of crimes within the Tribunals' jurisdiction.

In addition, States are themselves obliged to bring persons accused of grave breaches of the principal humanitarian law treaties, the 1949 Geneva Conventions and 1977 Additional Protocol I for trial before their own national courts or to extradite them for trial elsewhere. There is still a clear obligation on States to bring to justice those accused of grave breaches and national courts will continue to have an important role in the prosecution of war crimes.

International Courts and the ICRC

The International Committee of the Red Cross supports all efforts to promote respect for international humanitarian law and, in particular to punish war crimes. In this connection, it has strongly welcomed the establishment of the Hague and Arusha Tribunals and has actively participated in negotiations to establish a permanent international criminal court.





SUPPLEMENTARY READING 14

International humanitarian law and the Kosovo crisis: Lessons learned or to be learned

by James A. Burger

The premise of this article is that the Kosovo crisis was a significant event in regard to the law of armed conflict. The event started off as a humanitarian crisis with refugees pouring out of Kosovo into neighbouring regions, especially Albania and the Former Yugoslav Republic of Macedonia. NATO initiated military action not specifically authorized by the UN, but consistent with and in support of previous UN decisions [1]. The legal basis for military intervention will not be addressed beyond relating it to the issue that is the focus of the following paper, namely the application of the law of armed conflict to the campaign in Kosovo. This article considers *jus in bello*, and not *jus ad bellum*. But the causation of the conflict must be taken into account in evaluating the military actions taken. In this regard the crisis was caused by a humanitarian situation which had important effects on neighbouring States and upon regional stability. Major human rights violations were taking place within Kosovo. There was a massive movement of refugees forced out of Kosovo. It was feared that the conflict would spread. NATO nations decided that they had a legitimate right to intervene by taking military action. [2]

The questions to be addressed in this article are: what was the application of the law of armed conflict to this crisis, how was it applied, and what can be learned from it? However, the application of appropriate rules, such as those that apply to targeting, the treatment of participants who fall into hostile hands and other victims of the conflict, cannot be adequately judged without consideration of the underlying causes and reasons for the action. Were the military actions appropriate and proportionate to the stated political objectives and results? The rules that apply to refugees, war crimes issues, and the authority to govern within the context of a military operation also depend upon the situation caused by the underlying crisis. Are the laws in existence appropriate for the needs of peace-keeping operations? I believe that the need to consider causation will be evident in the following analysis.

The air war and targeting issues

The first and probably the foremost question concerns application of the law of armed conflict to the air war [3]. The use of force in the Kosovo crisis was largely through air power. Air power was openly announced as a means to stop the acts that were being perpetrated against the civilian population, and to force the Serbian government to agree to the settlement which had been accepted by the Kosovar Albanian delegation at Paris in March of 1999. If the Serbians would withdraw their forces, the air attack could be stopped. Suffice it to say here that the need to intervene to save lives and restore regional stability established the political objective for NATO's effort. There was a specific purpose for the military actions, and they must be judged at least in part on what the nations using the force were trying to achieve. The position of the NATO nations was that they were intervening to stop an ongoing crisis of international significance, and would use only so much force as was necessary to achieve the objective.



Targeting must always be judged primarily upon whether the targets were valid military objectives [4]. In this regard the targeting process in Kosovo was not secret. It was well covered on the television and in newspapers. Initial targets hit were Serbian surface-to-air missile sites, military installations and troop concentrations. These clearly were military objects. Other targets used for both civilian and military purposes, such as bridges, roads and communications facilities, also were attacked. The law of armed conflict provides that attacks may be made only against objectives which:

"... by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." [5]

Bridges and roads were used to send military forces into Kosovo, whereas communications facilities were used to send orders to military forces and receive their reports, spread Serbian propaganda, and generally prolong the war. Their damage or destruction was consistent with the definition of "military objective".

Attack on a military objective also must take into account principles of the law of armed conflict that impose limits on collateral injury to civilians not taking part in hostilities and collateral damage to civilian objects, including cultural property. Collateral damage is unintended damage to property that is not itself part of a valid military objective, but is incidental to attack of that objective. The law of armed conflict establishes a duty to take reasonable precautions, consistent with mission accomplishment and force protection, to minimize incidental loss of life or injury to civilians and damage to civilian objects [6]. Attacks that may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects must not cause damage "excessive in relation to the concrete and direct military advantage anticipated" [7]. "Military advantage" is not restricted to tactical gains. One must take into account the full context of a war strategy.

This obligation was taken into consideration by planners when targeting military objectives in Serbian cities. In those cases, an effort was made to limit risk to the civilian population and civilian objects though the use of precision-guided munitions, or by scheduling attacks at times, such as at night, when civilians were less likely to be present. Precision-guided munitions, the so-called "smart bombs", and cruise missiles made famous in the 1991 Gulf War [8] and used again in Yugoslavia, were the weapons of choice and used wherever possible. The law of armed conflict prohibition on indiscriminate attacks [9] was implemented through command guidance to call off an attack if weather or other circumstances prevented an aircrew from identifying and accurately targeting the military objective assigned to it for attack.

Collateral damage, however, cannot be completely excluded. Nor can mistakes in targeting, such as the bombing of the Chinese Embassy in Belgrade, which was the most obvious example during the Kosovo campaign [10]. The inquiry into the cause of the incident indicated that it was brought about by a mistake in intelligence. The wrong building was identified in the targeting process. While there was some scepticism that such a mistake could be made, mistakes in conflict, though regrettable, are inevitable. The law of armed conflict prohibits the intentional targeting of civilian objects not being used for military purposes. It requires a good faith effort in planning an attack to take "feasible" precautions to minimize injury to the civilian population or civilian objects. "Feasible precautions" are defined as those measures that are "practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations". [11]

A particularly difficult issue during the conflict was the decision to attack "dual use facilities" such as power plants, oil and petroleum depots, and buildings or building complexes used for civilian



and military purposes. When a civilian object is put to military use, it loses its protected status [12]. The law of armed conflict does not permit the presence of the civilian population to render an otherwise valid military objective immune from attack. Parties to a conflict are forbidden to make use of civilians to shield military objectives from attack [13]. Their use for that purpose is itself a violation of the law of armed conflict.

There are circumstances when targeted facilities by their nature serve both military and civilian purposes. For example, communications facilities or power plants necessarily have a dual use [14]. There may be no intention to disregard the rules, but these facilities cannot be considered protected from attack if they are being used for military purposes. In the Kosovo air campaign, in acknowledgement of the limited political objectives, an effort was made to distinguish as much as possible the military from the civilian aspects of these dual use targets. Planners endeavoured to strike targets in such a way that the military purpose for their attack would be obtained while minimizing, as far as practicable, the impact on the civilian nature of the target. Examples were the destruction, in a large building, of that part that was being used for military purposes. Another was cutting off power or communications lines, but doing so in such a way as to allow restoration as soon as possible for civilian uses once hostilities had ended.

The Kosovo air campaign witnessed an unprecedented review of targeting [15]. Reviews were conducted at NATO headquarters among the member States, and also by individual States participating in the air campaign [16]. There were military, political and legal reviews. Legal officers advising on operational law matters at each major command headquarters, at NATO headquarters in Brussels, military headquarters at SHAPE in Mons, Belgium, and in the NATO and national commands participating in NATO military actions, were involved in targeting decisions. There was recognition both of the obligation to follow the rules and of the fact that by limiting civilian damage the political and military objectives were better served.

Great effort was made to limit attacks to military targets, and to limit the extent of collateral injury to the civilian population and damage to civilian objects. In many cases targets were rejected because of their location in the vicinity of civilian housing or other civilian objects such as churches or hospitals [17], or if collateral damage might be expected to be politically if not legally excessive [18]. Accurate aerial photography and sophisticated weaponry made this possible. In those cases where dual use targets had been designated for attack, attack approval was given at highest levels, often with strict strike parameters (such as previously described) so as to minimize the risk of collateral civilian injury or damage to civilian objects. In all cases there had to be a military connection, and the targets were determined to be military objectives.

Prisoners of war

A significant issue arose with the capture of three American soldiers in the Former Yugoslav Republic of Macedonia by Serbian forces. At first there was some confusion over the status of these personnel. They had been part of the UN preventive deployment force (UNPREDEP) in Macedonia, but the mandate for this force had just expired. They were not in Macedonia for the purpose of the conflict, but they were soldiers of a State participating in an international armed conflict who were taken prisoner on the territory of a neutral State. The Third Geneva Convention relative to the Treatment of Prisoners of War provides that prisoners of war include:

"Members of the armed forces of a Party to the conflict as well as members of militias or volunteer [civilian] corps forming part of such armed forces." [19]

Some persons thought initially that it would be better to assert that the captured soldiers were illegal detainees, allowing the United States to demand their immediate release, rather than



waiting until the end of active hostilities, as is the customary practice and the obligation for release or repatriation under the Third Convention. [20]

It was clear that the nation taking the prisoners and the nation to whom the soldiers belonged were participating in hostilities. It was an international armed conflict between States. The laws of international armed conflict applied, and so did the Geneva Prisoner of War Convention. The United States correctly took the position that they were prisoners of war, and quickly announced this publicly. The prisoners were visited by delegates of the ICRC, and subsequently were released as fighting continued, even though under the Third Convention they could have been held until the cessation of active hostilities. The U.S. decision proved to be the right decision, because the soldiers were better protected under the clear rules provided by the Third Convention than under any vague human rights rules which could be applied to persons otherwise detained.

Another question of interest was the status of Kosovar Albanians who were taken into detention by Serbian forces, or Serbians who were taken as prisoners by the KLA (Kosovar Liberation Army). At issue was whether the conflict between the Serbian forces and the KLA had risen to the level of a non-international armed conflict covered by Article 3 common to the four Geneva Conventions of 12 August 1949 [21] or by the provisions of Protocol II additional to the 1949 Geneva Conventions and pertaining to non-international conflicts [22]. I believe that both treaties were applicable in the circumstances that existed. Those are the exact type of persons Article 3 of the Conventions and Protocol II were designed to protect. Once the hostilities became an international armed conflict (with the commencement of the air campaign), the rules of the Third Geneva Convention clearly applied between the States participating in the conflict. This included the potential situation in which the NATO forces might receive a Serbian prisoner from the Kosovar forces. The rules could have been applied by and in regard to Kosovar participants, if the KLA or the Serbian forces had announced that they would be bound by such rules.

KFOR and rebuilding the civilian structure

After the military conflict ended, the United Nations Security Council authorized the deployment of KFOR (Kosovo Force) [23], which was established by NATO. It was premised upon an agreement of the Serbians and upon negotiation of a separate agreement with the Kosovar Albanians. These agreements, based on principles established at Rambouillet and Paris in February and March 1999, included conditions for the complete withdrawal of all Serbian forces from Kosovo, and the demilitarization and transformation of the KLA. The UN Security Council ratified the peace plan and established a separate UN civilian organization, the United Nations mission in Kosovo (UNMIK), to deal with the civilian issues [24]. This raises the question whether the laws of armed conflict are applicable to the military force in a peace operation, and what rules apply to protect the civilian population. The provisions of the Fourth Geneva Convention on belligerent occupation apply during an armed conflict. With the cessation of open hostilities, KFOR was not an occupying force [25]. Its authority was not based on the imposition of military control by a State upon another State, but on the authorization by the United Nations to keep the peace. In this regard a decided effort is under way to fully implement the civilian part of the UN regime as soon as possible.

If the law of armed conflict does not apply, what rules do apply? What rules are relevant as a template for protection of the civilian population? The basis for KFOR and UNMIK is UN Security Council Resolution 1244 (1999). It authorized KFOR to do all that was necessary militarily to keep the peace, and UNMIK to do all that was necessary to restore civilian order and government. This situation no longer required an application of rules of armed conflict, but of civilian control



authorized by the UN and supported by a military peace-keeping force. One of the objectives of the United Nations regime was to re-establish all of the civil rights that must be provided by a legitimate democratic government, thus also including those laid down in generally accepted human rights conventions [26]. It must, however, be recognized that this is an interim situation where a conflict has been ended, but civilian control has not yet been restored. There are a multitude of general human rights rules which apply in any situation, but those which apply to a regime of belligerent occupation are not appropriate. There are very difficult problems in Kosovo. A clear example is the difficulty to proceed with judicial actions when there is no agreement on the national laws that apply. Kosovo is still part of Yugoslavia, but the majority ethnic Albanian population will not accept Yugoslav laws.

If the peace does not hold and conflict breaks out anew, the rules of international armed conflict would again apply. This was the solution in respect to the law of armed conflict used by NATO forces both in Bosnia and in Kosovo. The law of armed conflict was applied to situations where the circumstances made them applicable. Recently the UN Secretary-General has issued instructions to UN peace-keeping forces that they are to observe the rules of international armed conflict in their operations. The text states:

"They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defense." [27]

In this regard it is noted that the instructions in the Secretary-General's Bulletin may be overly broad in that not all participants in peace-keeping operations are party to Protocols I and II or to some of the other agreements referenced in the bulletin. However, the principle is clear that the laws of armed conflict should apply to peace-keeping forces in the appropriate circumstances. [28]

Provision of civilian relief

The immediate problem for KFOR and UNMIK was entering to restore order in Kosovo so that the civilian population could return, and then to enable relief to be provided to those who remained and to those who were returning. So many homes had been destroyed by the end of the conflict that many were without shelter, and winter was soon to come. Homes and living areas had to be made safe from mines placed during the war. But the legal responsibility of military forces is limited under the Fourth Geneva Convention and the Additional Protocols of 1977 [29]. Articles 68 to 71 of Protocol I lay down some detailed rules in regard to providing relief to civilians, such as the duty to provide food and medical supplies and to allow the provision of such relief. However, this is an obligation which applies to armed conflict or military occupation, and not to a peace-keeping force. [30]

The provision of relief to civilians outside military conflict situations properly remains a State obligation that may be tasked to military forces, but it is not an obligation imposed by international law upon military forces. The United Nations in Kosovo has taken upon itself to rebuild a civilian structure that had been completely destroyed. It also has taken upon itself the task of providing relief to a population devastated by the recent conflict. There has to be a civilian police authority to keep order, but there also must be food, shelter and medical supplies. A working government and a system of laws have to be re-established. The NATO military authorities rightly wished to leave this task as much as possible in the hands of the UN, and to provide the security to allow the civilian authorities to do what was necessary. But to a great extent the function of policing and civilian relief has been taken on by the military forces until the civilian structure can be re-established. Their task is difficult, and it is made more difficult because the applicable rules are not always entirely clear or appropriate for the problems that need to be addressed.



War crimes

Lastly, to what extent are the acts committed against civilians by Serbian forces or their agents in Kosovo war crimes? In the situation that preceded the international armed conflict, actions by the Serbian military forces led to the massive movement of refugees out of the country. Atrocities were committed which precipitated the conflict. It was recently estimated by a U.S. State Department report to the U.S. Congress that there may have been as many as 10,000 deaths brought about by the Serbian military operations in Kosovo [31]. One of the most flagrant was the killing of 45 villagers in the town of Rajak. The bodies of the victims were found with their eyes gouged out, bound, and some decapitated. It might be debated whether the law of armed conflict applied to these acts, and whether they took place during a situation of non-international armed conflict under common Article 3 of the Geneva Conventions or after the conflict became international. This question was rendered moot, however, when the International Criminal Tribunal for the former Yugoslavia (ICTY) indicted Milosevic and other Serbian officials for the war crimes committed in Kosovo [32]. ICTY asserted jurisdiction over all alleged war crimes in Kosovo.

More recently ICTY announced that it was looking into reports that NATO pilots had committed war crimes by bombing civilian targets. At the same time the Chief Prosecutor announced that these reports were not at the top of her priorities, and that she had more important things to look at [33]. ICTY subsequently announced that NATO actions were not being investigated, but merely that the prosecutor met with and received information from a variety of individuals and groups urging investigation [34]. In this regard, the above discussion that targets were selected because they were military in nature, and that great care was taken to consider the legal rules applicable, are appropriate considerations. Nations and their military commanders listened to their legal experts, and were well aware that their actions would be critically appraised.

Both IFOR/SFOR and then KFOR were given their supporting role for the International Criminal Tribunal for the former Yugoslavia by the North Atlantic Council. ICTY has the authority to investigate and to prosecute war crimes, and its authority applied equally to Kosovo as it did to Bosnia [35]. The types of support provided include security for ICTY personnel, intelligence information pertaining to security or their mission, some logistics support, and most sensitive assistance in detaining persons indicted for war crimes. Unlike in Bosnia, investigations in Kosovo were quickly started. There was no argument over whether KFOR should be involved in making detentions. In this regard there was no danger of dealing with a still existing military threat, as had been the case in the early days of IFOR. Also, rules for detention had already been established by IFOR and SFOR and served as a point of departure for similar procedures in KFOR.

The rule which I participated in formulating as Legal Advisor to the IFOR Commander was that the NATO forces would not hunt out war criminals, but they would detain indicted war criminals if they came across them in the course of their normal military operations, and hand them over to the ICTY authorities. ICTY and the military authorities are more used to each other's missions and to working together. But it is still a problem that the responsibility to make the detentions falls, out of necessity, upon military rather than civilian authorities. KFOR can make detentions based upon ICTY indictments, or it can act under general rules of the laws of armed conflict or its own rules of engagement to stop crimes committed in its presence, but not based on mere suspicion of criminal activities [36]. Military authorities neither can nor should replace civilian authority to arrest civilian offenders, including war criminals.



Conclusion

Important lessons can be learned from the conflict in Kosovo. The special problems in targeting are a consequence of modern war and society. As has been the experience of all wars of the past century and a half, the fact that military and civilian targets are intermixed is part of modern industrialized society. Dual use does not preclude attack of a military objective, but the increased precision of weapons also makes it possible to limit and distinguish between the two aspects of targets, and to make a special effort to limit civilian casualties and collateral damage. The existence of modern weapons which permit soldiers to distinguish between civilian objects and military objectives provides not only a military advantage, but also added opportunities for those who are planning the targeting in order to comply with national or alliance policy objectives, with military campaign objectives (as determined by policy objectives), and with the laws of armed conflict. In Kosovo the extent to which legal advice was sought and considered in planning and targeting was an extremely important aspect of the conduct of the conflict. While there may be disagreement over the application of the rules by commentators who write about it after the event, there can be no doubt that full consideration was given, as required by the laws of armed conflict, to the advice of legal counsel and the application of the rules [37]. This is an important lesson to be learned from the Kosovo conflict as regards applying the rules to actual conflict situations.

However, it would be wrong to assume that these are the only lessons. Other significant issues included the determination of who were prisoners of war, the rules applicable to the investigation and prosecution of war crimes, and, perhaps most importantly, determination of the extent of application of the law of armed conflict to a situation that changed from conflict to peace-keeping. Even where the law of armed conflict technically does not apply, it serves as an indispensable template for military conduct. As I observed earlier, the conflict was precipitated by a humanitarian crisis of huge dimensions. It presented the problem of how the world community can deal with such a crisis. Bringing relief to victims of a conflict is as much a responsibility under the laws of armed conflict as is the responsibility to limit the use of force and make discriminating decisions in choosing targets. But once the UN or nations acting in a peace-keeping capacity decide to intervene in a crisis situation, what rules will apply? Are there sufficient rules to provide guidance to rebuild the civilian structure, bring war criminals to justice, and bring the hostile parties together? Indeed there are. And this too is one of the lessons learned from the Kosovo crisis.

There is a very significant issue in the Kosovo experience of how well the laws of armed conflict do apply to peace-keeping missions. One aspect is the status of the rules to be followed by the forces themselves, and I have noted in this regard the UN Secretary-General's Directive of 6 August 1999. There is no question that the forces should be trained in and ready to apply the rules in appropriate situations. But the bigger question is to know what rules apply to the broader humanitarian situation. The laws of armed conflict may specifically not apply, but there is a need to apply forms of protection to victims in a peace-keeping situation similar to those provided for in a conflict situation. There is a period after the conflict ceases and before peace is truly re-established that must be considered as well. Much of the responsibility necessarily belongs to the civilian authority in the peace-keeping mission, and the military forces take on a supporting role. Responsibilities and rules must be studied in this light. This might be the most important lesson learned from the Kosovo conflict.

Notes

1. Acting under Chapter VII of the UN Charter the UN Security Council called in its Resolution 1199 of 23 September 1998 for the withdrawal of Serbian security forces from Kosovo. It decided that there was "a threat to peace and security in the



- region", and called upon the participants to improve the situation and initiate negotiations to bring this about.
2. NATO Secretary General Javier Solana stated that Resolution 1199 gave the Alliance the right to use force: "We have the legitimacy to act to stop a humanitarian catastrophe". *Financial Times*, 10/8/98. See also Solana, "NATO's success in Kosovo", *Foreign Affairs*, Vol. 78, November/December 1999, pp. 114-120.
3. The question of the use of force in the Kosovo air campaign was submitted to the International Court of Justice by the Federal Republic of Yugoslavia, which complained about attacks against civilians, civilian objects, protected objects, etc. The Court declined to make a decision on jurisdictional grounds. See "*Legality of use of force*", *Yugoslavia v. United States of America*, *ICJ Press Communiqué* 99/33 of 2 June 1999. The same decision has been taken in the cases brought against other NATO nations involved in the air campaign.
4. Protocol I additional to the Geneva Conventions of 12 August 1949, Art. 48 (Basic rule): "Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."
5. Protocol I, Art. 52.2.
6. Protocol I, Art. 57.2(a)(ii): Those who plan or decide upon an attack must "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects."
7. Protocol I, Art. 57.2(a)(iii).
8. For a description of law of war issues in the 1991 Coalition effort to liberate Kuwait, see U.S. Department of Defense, *Final Report to Congress: Conduct of the Persian Gulf War*, April 1992, pp. 605-632.
9. Protocol I, Art. 51.4, provides: "Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol ..."
10. Embassies must be protected as civilian objects.
11. Protocol I, Art. 57.2(ii) and (iii), and definition given in the declaration made by Italy on ratification of the 1977 Protocol I additional to the Geneva Conventions of 1949. This definition was subsequently incorporated into Article 1.5 of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.
12. The rule is that civilian objects are protected, but if, "by their nature, location, purpose or use" in the circumstances ruling at the time, they meet the definition of a military objective, they lose their status as civilian objects and become legitimate targets. See Protocol I, Art. 52, paras 1 and 2.
13. Protocol I, Art. 51. 7.
14. Note that this is not a question here of works or installations containing dangerous forces which are protected under Protocol I, Art. 56. The latter, e.g. dams and nuclear power plants, are objects the destruction of which could release dangerous forces and cause widespread injury among civilians.
15. The standards for review are clearly set out in Protocol I, Art. 57.2 (i), (ii) and (iii): Precautions in attack.
16. Today's laws of armed conflict clearly require a legal review of military actions. There must be legal advisors, and commanders must take legal rules into consideration. Protocol I, Art. 82.
17. Protocol I, Art. 53: Protection of cultural objects and places of worship.
18. *Loc. cit.* (note 6).
19. 1949 Geneva Convention relative to the Treatment of Prisoners of War, Art. 4.A(1). Members of the armed forces of a party to an international armed conflict who fall into the power of the enemy are prisoners of war. There is no distinction made as to where or how they are taken prisoner.
20. *Ibid.*, Art. 118. The release must take place "without delay" after active hostilities have ended.
21. Art. 3 common to each of the four 1949 Geneva Conventions provides basic protection for non-international armed conflicts. Protocol II provides more detailed protection, including protection under Art. 5 thereof, for detained persons.
22. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts (Protocol II).
23. UN Security Council Resolution 1244 of 10 June 1999.
24. *Ibid.*
25. Art. 6 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 provides that application of its provisions ceases upon the close of military activities, but that they may continue to apply during a regime of occupation.
26. In the Dayton Peace Agreement the parties specifically agreed to observe the International Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, etc. See Annex I to the Dayton General Framework Agreement of December 1995.
27. Observance by United Nations forces of international humanitarian law, UN Secretary-General's Bulletin of 6 August 1999, ST/SGB/ 1999/13. See also *IRRC*, No. 836, December 1999, pp. 812-817.
28. For example, the U.S. Chairman of the Joint Chiefs of Staff Instruction 5810.01 (12 August 1966), which preceded the Secretary-General's Bulletin, declares as a matter of policy (para. 4a): "The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and unless otherwise directed by competent authorities, will apply law of war principles during all operations that are characterized as Military Operations Other Than War."



29. See, e. g., *loc. cit.* (note 25).
30. Protocol I, Art. 69, provides for basic needs in occupied territories to be met, such as food, shelter and medical relief, and Art. 75 provides for fundamental guarantees for persons "in the power" of a party to a conflict.
31. "Report to Congress", *New York Times*, 10 December 1999, p. 12.
32. Besides President Milosevic, also indicted were Milan Milutinovic (President of Serbia), Nikola Sainovic (Deputy Prime Minister, FRY), Dragoljub Ojdanic (Chief of Staff of the FRY Army) and Vljako Stojiljkovic (Minister of Internal Affairs of Serbia). See ICTY press release JL/PIU/403-E, 27 May 1999.
33. AP press release, 28 December 1999, and "UN Tribunal Plays Down Scrutiny of NATO Acts", *New York Times*, 30 December 1999.
34. ICTY press statement, 30 December 1999.
35. The authority of ICTY is based on the UN Security Council resolution under which it was set up, and applies to all of former Yugoslavia.
36. "Rules of Engagement for open publication", reprinted in Appendix 5 to the KFOR ROE, a NATO document dated 7 June 1999.
37. Protocol I, Art. 82 requires that parties to that treaty "ensure that legal advisers are available, when necessary, to advise military commanders".

SUPPLEMENTARY READING 15

The ICC Jurisdictional Regime: Addressing U.S. Arguments

Human Rights Watch

Since the diplomatic conference in Rome, U.S. representatives have made much of claim that the International Criminal (ICC) is overreaching, asserting that it is based on "universal jurisdiction" and binds state parties through the potential exercise of jurisdiction over their nationals. This has used to support the position that some form of veto over the ICC's docket should be given the state of nationality of the accused. These claims embody a misrepresentation of the jurisdictional provisions of the ICC treaty and of existing state --including that of the United States-- under general international law and treaties. In fact, far from the overreaching alleged, Article 12 of the ICC treaty establishes a very conservative regime, far more limited than universal jurisdiction and more restrictive than the regimes embodied in other international treaties.

THE JURISDICTIONAL BASIS OF THE ICC TREATY

Before the ICC can act, the state of territory or nationality of the accused must be a party to the ICC treaty or accept the Court's jurisdiction (Article 12). A proposal advanced by South Korea, which enjoyed overwhelming support at the Diplomatic Conference, would have allowed the ICC to prosecute if any one of four states had ratified the ICC treaty or accepted the Court's jurisdiction. These were the state on whose territory the crimes were committed, the state of nationality of the accused, the state of nationality of the victim or the state with custody of the accused. While the reduction in the scope of the Court's jurisdiction to its present form is regrettable, and will limit the circumstances in which the Court can exercise its jurisdiction, it is not fatal to its ability to function. It remains clearly preferable to the yet more restrictive state of nationality veto which would, in practice, reduce the ICC to an extremely limited system of ad hoc justice, based on political expediency.



Under the Article 12 regime, the Court would most likely have jurisdiction in cases an "international" element, where the state of nationality and territory are distinct states. With widespread ratification or Security Council referral it will also be able to prosecute genocide, crimes against humanity or war crimes committed within a single state, when the territorial state and state of nationality of the accused are one and the same. The extent of support for the treaty in Rome, and the diverse range of states that have already signed the treaty, provide a positive starting point to move toward global ratification. Many states will, we believe, see the positive deterrent value of ratification of the ICC treaty. Particularly those states that have made a recent transition to democratic governments are likely to embrace the ICC as insurance against future atrocities.(1) Even in states that do not ratify, new governments may well accept the ICC's jurisdiction over crimes committed prior to transition. Furthermore, the Security Council will refer situations to the Court, albeit selectively, thus overriding the prerequisites to the exercise of jurisdiction(2). We believe that situations will exist in the future, as they have in the past, in which the interests of international justice and the interests of the Council, including all five permanent members, will coincide and the jurisdiction of the ICC be invoked.

The U.S. had insisted that the ICC's authority be yet more restrictive, depending solely on the acceptance of the Court's jurisdiction by the state of nationality of the accused. Assertions were made following the conference that any other approach violates international law. Yet requiring the consent of the state of nationality would be out of line with jurisdictional theory and state practice. The first and best established jurisdictional principle is 'territoriality'(3): when crimes are committed on the territory of a state, that state is entitled to exercise criminal jurisdiction, whatever the nationality of the accused. Insisting on the state of nationality as the essential nexus for prosecution contradicts even this most basic principle. It would be ludicrous to argue that the state of territory should require the consent of the state of nationality before prosecuting.

Moreover, the majority of the core crimes in the ICC treaty are crimes which, under general international law, any nation in the world has the authority to prosecute as crimes of universal jurisdiction.(4) This principle has been applied as a basis for jurisdiction in a number of domestic cases(5) ,including in the U.S..(6) Again, this jurisdiction could be exercised without requiring consent of the state of nationality of the accused, or any other state. The Article 12 requirement that the state of territory or nationality must have ratified the treaty or accepted its authority imposes preconditions on the exercise of ICC jurisdiction that would not be imposed on the exercise of universal jurisdiction by any state. Assertions that the ICC is empowered exercise some form of universal jurisdiction are therefore spurious.

THE IMPACT OF THE TREATY ON NON-STATE PARTIES

The claim that the statute is "overreaching" because it supposedly binds states that not ratified the treaty through the exercise of jurisdiction over their nationals is a gross distortion.

The ICC treaty does not "bind" non-States Parties or impose upon them any obligations toward the Court. Part 9 of the ICC statute, dealing with state with the Court, specifically obliges only "state parties" to cooperate fully and undue delay; a clear distinction is drawn in a number of provisions between state parties and non state parties. Those who have put forward these concerns would not dispute this. Rather, their concern relates to the prosecution of a non-state parties nationals without its consent, wrongly characterized as "binding" the state in question.



As noted above, this possibility already exists as part of general international law and corresponds with established state practice. The following section explains that there is, moreover, nothing unusual about the conferral of jurisdiction over nationals of non-State Parties through the mechanism of treaty law.

EXISTING TREATY LAW AND PRACTICE

Many treaties, such as hijacking or anti-terrorism conventions, provide for states other than the state of nationality of the accused to exercise jurisdiction over persons accused of having committed the serious crimes within their scope.⁽⁷⁾ Those treaties provide - reflecting the states mentioned in the ICC treaty - firstly for the state of territory or secondly for the offender's state of nationality to exercise jurisdiction⁽⁸⁾. In most cases they go beyond, providing that the state of nationality of the victim⁽⁹⁾ should also do so. And all contain provision for all state parties who find an offender on their territory to either prosecute or extradite. These treaties, like the ICC treaty, do not require that the state of nationality be a party to the treaty or consent to prosecution. This is unsurprising. It is hard to conceive of an anti-terrorism treaty, for example, that required ratification or consent by the state of nationality of the accused being acceptable to states, and certainly not to public opinion or to the government in the United States.

The U.S. is party to all but one of the treaties cited in this paper.⁽¹⁰⁾ It has in fact exercised jurisdiction over non-U.S. nationals in a number of cases, on the basis of the treaty provisions empowering it to do so. One example involved a Lebanese citizen suspected of hijacking a Jordanian aircraft in the Middle East. Based on domestic legislation implementing the International Convention Against the Taking of Hostages and the Hague Convention,⁽¹¹⁾ the US exercised jurisdiction as the state of nationality of two U.S. passengers who were among the victims of the alleged crime. A similar case concerned the murder of a U.S. congressman by a Guyanan citizen in Guyana, with the prosecution based again on the victim's nationality, as provided for in the Convention on the Prevention and Punishment of Crimes against Internationally rotected Persons.⁽¹²⁾ In neither of these cases, nor in another similar case,⁽¹³⁾ was it argued or considered by U.S. Courts, that the non-ratification of the relevant treaty by the suspect's state of nationality might somehow render "overreaching" or questionable the exercise of U.S. jurisdiction.

NOTES

1. Although a State Party can withdraw from the statute, it can do so only one year after receipt of a written notification (Article 127). Withdrawal does not affect the Court's consideration of a matter being investigated or prosecuted prior to the effective date of withdrawal.
2. The Article 12 prerequisite that one of the state of territory or the accused's nationality have ratified or accept jurisdiction expressly applies only to complaints by a state party or the exercise of the prosecutor's ex officio power under Article 15. No state could prevent the ICC from exercising jurisdiction in the event of a Security Council referral.
3. The Comment to s. 402 of the Restatement of the Law (Third), Foreign Relations of the United States, (American Law Institute, 1987) (hereafter The Restatement), recognizes that "[t]erritoriality is considered the normal, and nationality the exceptional, basis for the exercise of jurisdiction."
4. The Restatement, para.404: "A state may exercise jurisdiction to define and punish offense recognized by the community of nations of universal concern, such as piracy, slave trade, attacks on or hijacking o aircraft, genocide, war crimes, and perhaps terrorism, even where none of the bases of jurisdiction indicated in s. 402 is present."
5. See also Attorney General of Israel v. Eichmann, in International Law Review, vol. 36, p.50 (Israel Supreme Court, 1962) where the Israeli Supreme Court found, similarly, that there was "full justification for applying here the principal of universal jurisdiction since the international character of "crimes against humanity"... dealt with in this instant case is no longer in doubt..."
6. In re Demjanjuk, 612 F.Supp. 544 9N.D.Ohio 1985), aff'd, 776 F2d 571 (6th Cir. 1985) the court allowed the extradition to Israel of a German concentration camp guard. The Court invoked universal jurisdiction, noting: "international law does not generally prohibit the application of national laws over non citizens for acts committed outside its territory." The Court



noted that "Israel has brought charges...asserting jurisdiction based on a statute that penalizes "war crimes" and "crimes against humanity" among other acts. The international community has determined that these offenses are crimes over which universal jurisdiction exists." The Court also cited the case of *United States v. Otto*, Case no 000-Mauthausen-5 (DJAWC, July 10 1947), to the effect that "international law provides that certain offenses may be prosecuted by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and punishment."

7. See the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Dec 12, 1969 U.N.T.S. 220-241, the Convention for the Suppression of Unlawful Seizure of Aircraft ("The Hague Convention") Sept 21, 1971, 860 U.N.T.S. 105, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("The Montreal Convention"), Sept 23, 1971, 24 UST564, the International Convention Against the Taking of Hostages, G.A.Res.34/146, 34 U.N.GAOR Supp. (No39), UN Doc A/39/819(1979), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents ("The Protected Persons Convention"), Dec 14, 1973, 1035 U.N.T.S.167, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("The Convention Against Torture"), Dec 10 1984, 1465 U.N.T.S. 113, the International Convention on the Suppression and Punishment of the Crime of Apartheid ("The Apartheid Convention"), Nov 30, 1973, 1015 U.N.T.S. 243, the Convention on the Physical Protection of Nuclear Material, 1456 U.N.T.S.24631.

8. These treaties affirm not only the competence but also the obligation of the specified States to exercise jurisdiction.

9. The International Convention Against the Taking of Hostages, the Montreal Convention, the Protected Persons Convention, the Convention Against Torture and the Apartheid Convention.

10. The International Convention on the Suppression and Punishment of the Crime of Apartheid.

11. *United States v. Fawaz Yunis*, 924 F.2d 1086 (D.C. Cir.1991). The court upheld the U.S. court's subject matter jurisdiction, based on the Hague Convention and the International Convention Against the Taking of Hostages referred to above (924 F2d at 7, 12-13), that the victim's state of nationality may exercise jurisdiction. The court held this to be consistent with customary international law (924 F2d at 8).

12. *United States v. Layton*, 509 F.Supp. 544 (N.D.Cal. 1981), *aff'd*, 855 F.2d1388 (9th Cir.1988).

13. See also *U.S. v. Yousef*, 927 F.Supp 673 (S.D.N.Y. 1996), where jurisdiction was based on the Montreal Convention.



SUPPLEMENTARY READING 16

Superior orders and the International Criminal Court: Justice delivered or justice denied

by Charles Garraway

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On 17 July 1998, the Statute of the International Criminal Court was adopted in Rome. Nestled in Part 3, "General Principles of Criminal Law", was Article 33, entitled "Superior orders and prescription of law". Article 33 reads :

"1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless :

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question ;
 - (b) The person did not know that the order was unlawful ; and
 - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."
3. It has been argued by some that this is a dangerous withdrawal from the standards contained in the Charter of the International Military Tribunal at Nuremberg and followed in the Statutes of the ad hoc Tribunals for former Yugoslavia and Rwanda [1]. The following commentary will argue that, far from being a withdrawal, this article in fact reflects both the traditional understanding of the law and is entirely consistent with the intentions of the drafters of the Nuremberg Charter. [2]

Before Nuremberg

The issue of whether superior orders should provide any form of defence under international law has been controversial since the trial of Peter von Hagenbach in the fifteenth century [3]. It reflects the conflict between the requirements of military discipline that orders be obeyed and the requirements of justice that crimes should not go unpunished. Oppenheim, in the first edition of his standard work on international law published in 1906, stated : "In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy." [4]

The matter arose in the Leipzig Trials after the First World War. In the Llandovery Castle Case, the Supreme Court of Leipzig, in considering a similar provision in the German Military Penal Code, stated :

"However, the subordinate obeying an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law... It is



certainly to be urged in favour of the military subordinates that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including the accused, to be without any doubt whatever against the law."

[5]

Despite this move away from the firm position adopted by Oppenheim in 1906, Oppenheim's treatise itself was not amended until 1940, by which time the Second World War was under way [6]. As early as 1941, consideration was already being given to trials at the conclusion of hostilities. When those trials came to fruition at Nuremberg, Article 8 of the Charter of the International Military Tribunal stated :

"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

The wheel had turned full circle since Oppenheim had written in 1906.

Yet an examination of the negotiating history of the Charter reveals a slightly different picture. In 1941, a committee had been established to draft rules of procedure for future war crimes trials. A subcommittee was formed to look at the issue of superior orders. They reported that :

"Generally speaking, the codes of law of the respective countries recognise the plea of superior orders to be valid if the order is given by a superior to an inferior officer, within the course of his duty and within his normal competence, provided the order is not blatantly illegal. The conclusion reached was that each case must be considered on its own merits, but that the plea is not an automatic defence." [7]

A similar line was adopted by the Legal Committee of the United Nations Commission for the Investigation of War Crimes, established in 1943. However, this did not meet with unanimous support and by 1945, the Commission had to accept that it "does not consider that it can usefully propound any principle or rule." It did nonetheless state "that the mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility." [8]

The United States draft which was included in the working paper for the London Conference read :

"In any trial before an International Military Tribunal the fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute a defense per se, but may be considered either in defense or in mitigation of punishment if the tribunal determines that justice so requires." [9]

However, it should be noted that this proposal was designed for a tribunal that was being established specifically to try major German war criminals. This point was made in the discussions on superior orders at the London Conference when General Nikitchenko, representing the Soviet Union, asked : "Would it be proper really in speaking of major criminals to speak of them as carrying out some order of a superior ? This not a question of principle really, but I wonder if that is necessary when speaking of major criminals." [10]

The discussion ended with agreement that superior orders should not form "an absolute defence" but that the Court should be able to consider it in mitigation. Article 8 was approved with all mention of superior orders as a defence, absolute or otherwise, deleted. A similar provision was subsequently inserted in Allied Control Council Law No. 10 providing for the trials in Germany of lesser war criminals.

Nuremberg and after



At Nuremberg itself, the crimes alleged were of such a magnitude that the absolute nature of the denial of the superior orders defence made little or no difference. However, subsequent tribunals had greater difficulty. They sought to resolve the matter by treating it as an issue of intent. For example, in the Hostage Case (United States v. Wilhelm List et al.), the tribunal held :

"We are of the view ... that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice."
[11]

In the Einsatzgruppen Case (United States v. Otto Ohlendorf et al.) [12], superior orders were considered as a form of duress. In the High Command Case (United States v. Wilhelm von Leeb et al.), dealing with the passing on of orders from higher commands, the Tribunal stated :

"Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law." [13]

Since 1945, the international community has struggled to find a way of reconciling the strict Nuremberg standard with the realities of military life as reflected in the various Tribunal judgements. Different solutions have been examined. The International Law Commission, in seeking to encapsulate the principles of international law flowing from the Nuremberg Tribunal, suggested the test of whether "a moral choice was in fact possible." [14] This proved unacceptable. The International Committee of the Red Cross put forward a draft text to the 1949 Diplomatic Conference which produced the Geneva Conventions, but it was rejected with the comment : "The Diplomatic Conference is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years." [15]

A similar fate befell a provision put before the Diplomatic Conference which produced the 1977 Protocols. The final draft text had an Article 77 which read :

"The mere fact of having acted pursuant to an order of an authority or a superior does not absolve an accused person from penal responsibility, if it be established that in the circumstances at the time he knew or should have known that he was committing a grave breach of the Conventions or of this Protocol. It may, however, be taken into account in mitigation of punishment." [16]

Although the text attracted a majority, it did not reach the two-thirds required for inclusion in Additional Protocol I and thus failed [17].

Academic opinion divided into two main schools. The first rejected any suggestion of superior orders as a defence and the second allowed the defence if the orders were not manifestly illegal [18]. The poisoned chalice of resolving this issue thus passed to the Diplomatic Conference on the Establishment of an International Criminal Court.

Statute of the International Criminal Court

Over fifty years had elapsed since the London Conference had drafted the Nuremberg Charter. The Rome Conference could not seek to duck the issue as in 1949 nor, as a result of the structure of the Statute, could they seek to restrict any provision to grave breaches. Furthermore, they were not looking back to crimes already committed but forward to conflicts not yet envisaged.

Many at the Conference wanted to retain the Nuremberg standard [19]. They cited the Statutes of



the two ad hoc Tribunals for former Yugoslavia and Rwanda and argued that the sort of crimes that would be dealt with by the ICC would be such that any question of superior orders would be irrelevant. Others were more cautious [20]. The structure of the Conference meant that the general principles were being drafted at the same time as the crimes themselves were being elaborated. It was not clear whether the Court would be restricted to crimes "committed as part of a plan or policy or as part of a large-scale commission of such crimes" or whether individual crimes would be within the jurisdiction of the Court. The tension was in some ways similar to that to be found between the jurisprudence of the Nuremberg Tribunal itself and that of the Tribunals established under Allied Control Council Law No. 10.

The decision that was taken to adopt Article 33 represented, in the view of most, a sensible and practical solution which could be applied in all cases. In particular, it was limited to war crimes, as it was recognized that conduct that amounted to genocide or crimes against humanity would be so manifestly illegal that the defence should be denied altogether in consistency with the Nuremberg standard. It would, of course, not prevent superior orders being raised as part of another defence such as duress.

Since the conclusion of the Rome Conference, it is possible to examine Article 33 against the list of crimes and also against the other provisions in the Statute dealing with the mental element (Article 30) and mistakes of fact and law (Article 32). It contains a high standard. The three requirements in Article 33, paragraph 1, are cumulative not disjunctive. For a start, the accused must be under a legal obligation to obey orders -- a moral duty is not enough. Superior orders mean just that -- orders. Thus the government official who carries out instructions which amount to war crimes is not protected unless he is subject to some legal compulsion. The fact that he might lose his job if he refused is, it is suggested, not sufficient.

Even if this first hurdle is overcome, the defence is made out only if the accused did not know that the order was unlawful AND the order was not manifestly unlawful. There is an uncertainty here in where the burden of proof lies. Article 67, paragraph 1(i), provides that the accused is entitled "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." Although it would seem therefore that only an evidentiary burden can be placed on the accused, Article 67 begins with the words "having regard to the provisions of this Statute" ; it could consequently be argued that in this case there is a greater burden placed upon the accused than merely evidentiary. This may become clearer when the Rules of Procedure have been drafted.

A study of the list of crimes contained in Article 8 reveals that this defence, if it is such, will be extremely limited in scope. The majority of crimes are so manifestly illegal that the issue would never arise. However, this may not necessarily be the case for all crimes and for all ranks. An example may suffice : Article 8, paragraph 2(b)(xix), provides that it is an offence to employ "bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions." Few private soldiers are expert in the wounding effects of different types of ammunition and few could probably identify bullets to which this prohibition would apply. At present, it is unclear what mental element is required for this offence. Article 30 states that "unless otherwise provided", both intent and knowledge are required. Intent is defined as where :

- "(a) in relation to conduct, that person means to engage in the conduct ;
- (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."

Similarly, knowledge is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." If this provision requires particular knowledge of the propensity of the bullet in question, then it sets a particularly high standard and attempts may be



made to provide otherwise in the "Elements of Crimes" drafted in accordance with Article 9 of the Statute [21]. What that might lead to remains to be seen, but it would seem that the gravamen of this offence, taken of course from the 1899 Hague Declaration concerning Expanding Bullets, is in the issuing of such bullets rather than in the activities of the individual soldier who acts in good faith with ammunition issued to him. It may come down to an issue of intent, but to impose a strict liability test would seem to be somewhat harsh.

At the end of the day, the combination of the intent provisions of Article 30 and the "Elements of Crimes" may resolve these issues and render the provisions of Article 33 redundant. However, that is not yet clear and it is suggested that the text laid down in that article provides a satisfactory balance between the interests of justice and the obligations of a soldier. It does not provide, in itself, an escape to impunity but may, in those rare cases when it is likely to be invoked, provide justice to a soldier who finds himself carrying the responsibility for decisions made in good faith on the basis of orders given by others who had information, denied to the accused himself, which rendered the order illegal.

Conclusion

Justice is a two-way street. Soldiers are often as much victims of the decisions of their superiors as civilians. In the circumstances of Nuremberg, it was right to exclude any reference to superior orders as a defence. However, as General Nikitchenko realized, that was a decision based on specific circumstances. It is therefore argued that to do so in the International Criminal Court could itself lead to injustice in particular cases, an odd result for a Court whose Statute's Preamble includes the phrase : "Resolved to guarantee lasting respect for the enforcement of international justice".

Notes

1. Paola Gaeta, "The defence of superior orders: The Statute of the International Criminal Court *versus* customary international law", *European Journal of International Law*, Vol. 10, 1999, pp. 172 ff.
2. Howard S. Levie, "The rise and fall of an internationally codified denial of the defense of superior orders", *Revue internationale de droit militaire et de droit de la guerre*, Vol. 31, 1991, pp. 183 ff.
3. For a fuller account of the trial see Edoardo Greppi, "The evolution of individual criminal responsibility under international law", *IRRC*, No. 835, September 1999, pp. 533 ff.
4. L. Oppenheim, *International Law: A Treatise*, Vol. 2, 1906, p. 264.
5. The Llandovery Castle Case, *Annual Digest 1923-1924*, Case No. 235, Full Report, 1921 (CMD. 1450), p. 45.
6. L. Oppenheim, *International Law: A Treatise*, Vol. 2, 6th ed., 1940, pp. 453-455.
7. *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, cited in Levie, *op. cit.* (note 2)
8. *Ibid.*
9. Report of Robert H. Jackson, United Nations Representative to the International Conference on Military Trials, 1949, pp. 22 and 24, cited in Levie, *op. cit.* (note 2).
10. *Ibid.*, pp. 367/8.
11. *Trials of War Criminals*, Vol. XI, p. 1236.
12. *Ibid.*, Vol. IV, p. 411.
13. *Ibid.*, Vol. IX, p. 511.
14. See "Formulation of the Nuremberg Principles", *International Law Commission Yearbook 1950*, p. 374.
15. *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. IIB, p. 115.
16. *Official Record of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. III, p. 331
17. *Ibid.*, Vol. VI., p. 308.
18. See A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, 1996, pp. 144/5.
19. Gaeta, *loc. cit.* (note 1), p. 188.
20. See the original proposal of the United States, A/CONF.183/C.1/WGCP/L.2, 16 June 1998.
21. This text is still under discussion in the Preparatory Commission



SUPPLEMENTARY READING 17

The Compatibility of the ICC Statute with Certain Constitutional Provisions around the Globe

Human Rights Watch

This paper focuses on the compatibility of the ICC statute with particular constitutional provisions. While constitutions and the issues they give rise to vary, the questions identified in this paper are among the most common and the most complex, which have given rise to considerable debate in recent months in capitals around the world.

The first question relates to the compatibility of the obligation to surrender to the ICC with a constitutional prohibition on the extradition of a state's own nationals, which is being considered in several parts of the world, including Brazil, parts of Central Europe, Finland and Germany. A second issue is how to marry constitutional immunities with the duties to arrest and surrender under the statute. This again is under discussion in several states in Western, Central and Eastern Europe and across parts of Latin America. Thirdly, there is the question of the compatibility of the constitutional prohibition on life imprisonment with the statutory provisions on penalties, which is currently subject to intense debate in several Latin American capitals, as in Portugal and Spain.

In a number of countries the ICC statute currently lies before parliament or other body, awaiting determination of these issues. The coming months therefore represent an important window of opportunity for the Court's supporters to assist those governments, parliamentarians and other interested people who are committed to finding a solution consistent with early ratification. Regional coordination initiatives are one crucial tool. But in addition, states which have themselves grappled with these constitutional questions are well placed to reach out and work in partnership with others, as they seek the most constructive solutions for their country. In particular, those states that have come to the view that the constitutional provisions and the statute are consistent and amendment unnecessary, could allow others to benefit from the development of thought underlying that view. For states that have decided to amend, also, outreach may ensure that those decisions are not misinterpreted. It should be recalled that the first decisions that states take on these issues, and the way they are perceived by the outside world, could have a powerful impact, for better or worse.

The focus of this paper will be a brief exploration of arguments as to how constitutional provisions might be interpreted consistently with the ICC statute. While it is recognized that it may not always be possible to rely on such an interpretative route, in certain countries the procedural burdens and political realities are such that a requirement of constitutional amendment may lead to excessive delays and seriously hamper the ratification effort. If this can be avoided by creative interpretation of the constitutional provisions consistently with the treaty, this deserves the serious attention of the ICC's proponents.

The following are some of the preliminary ideas and arguments that are circulating as to how the constitutional provisions identified above, which were generally drawn up before an ICC was contemplated, can be read harmoniously with the statute. While research and discussion in this



field remains at a very preliminary stage, it is hoped that the ideas that have emerged to date might provoke creative thinking and constructive debate on these questions.

1 EXTRADITION OF NATIONALS

The first question that arises is whether the well known prohibition in many constitutions on the extradition of a state's own nationals to a foreign jurisdiction is consistent with the obligations of state parties to surrender suspects to the ICC. This prohibition spans the globe, appearing in constitutions of Western European, Central and Eastern European and Latin American states.

Extradition vs. Surrender

The most popular and perhaps most convincing way of approaching this provision consistent with statute involves an understanding of the qualitatively different nature of 'surrender' and 'extradition'. Art 102 of the statute distinguishes between surrender, which is "the delivering up of a person by a State to the Court", and extradition, which is "the delivering up of a person by one state to another...." While some have questioned the significance of 'terminology', the distinction reflects the important underlying principle that transfer to another equal sovereign state is fundamentally different from transfer to the ICC, an international body established under international law, with the involvement and consent of the state concerned. Distinguishing extradition from surrender or transfer, has become well established through the practice of the ad hoc tribunals. 'Extradition' does not appear in the Security Council Resolutions, or in the statutes or Rules of the tribunals. Rather, indictees are 'transferred' or 'surrendered', and in its reports the Tribunals have called on states not to apply to their requests, by analogy, existing legislation or bilateral conventions governing extradition.

A Foreign Court?

Some observers have gone so far as to suggest that the ICC can properly be considered an extension of domestic jurisdiction. Whether or not so conceptualized, many feel that the ICC is not in fact a 'foreign court' or 'foreign jurisdiction' as anticipated in the various constitutional prohibitions. When the constitutions prohibited extradition to foreign jurisdictions they clearly contemplated national not international jurisdiction. An international court which states set up, in accordance with international law, and in which they will fully participate as state parties, from financing it to the appointment and removal of judges, for example, is not comparable to any foreign national court. Just as normal extradition procedures and the concerns that such proceedings seek to protect--being to ensure the fairness of the proceeding and the legitimacy of the charges- do not apply to surrender to the ICC, nor should this prohibition on the extradition of a state's own nationals.

The Nature of the Crimes and International Law

The third set of issues which should be explored in assessing whether there is any potential constitutional conflict is based on the nature of crimes within the ICC's jurisdiction. These are crimes which the preamble refers to as 'the most serious crimes of concern to the international community as a whole.' The duty of states to investigate and prosecute certain serious international crimes should also be borne in mind. Specific international instruments such as the Convention against Torture, the Genocide Convention, the Geneva Conventions enshrine this duty explicitly. This is reflected in the preamble to the Statute itself which provides that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'.

Constitutional provisions should be interpreted consistently with international law obligations. It may be that, where there is a clear conflict between constitutional and international law, national law determines the hierarchy between the two. But the constitutional provisions in question,



rather than explicitly conflicting with the requirements of international criminal jurisdiction - which was not even anticipated at the time of their creation - are silent on the matter. Where they permit of differing possible interpretations, with one consistent with international law and the other not, there is a strong argument in favor of construing the constitution and international law consistently. (This argument is not of exclusive relevance to the interpretation of the extradition provisions and applies to all the potential issues, perhaps most pertinently to the immunities issue discussed below)

Impunity and Complementarity

Reference has also been made to the fact that the objective of the prohibition on the extradition of nationals was not to guarantee impunity for these egregious crimes. For this reason, it is interesting to note that many of the systems that have such a prohibition also have legislation that enables them to exercise jurisdiction over their nationals for crimes committed anywhere in the world. And where they do so, in accordance with the complementarity provisions of the statute, the Court will not have jurisdiction and no obligation to surrender to the Court arises. Complementarity is therefore the fourth frequently invoked argument as to why there is no real constitutional conflict. The ICC will only prosecute where no state is willing or able to do so. If a state party with a prohibition on the extradition of nationals does not want to transfer the individual to the ICC, it simply has to carry out a genuine investigation on the national level and the issue is avoided.

2 IMMUNITIES.

Many constitutions provide some sort of immunity from criminal process for a head of state, president, government officials and/or parliamentarians. As is well known, the question that has arisen relates to the compatibility of such immunities with Article 27 of the statute, entitled 'irrelevance of official capacity' and the obligation to arrest and transfer suspects to the Court. Immunities are not homogenous; they vary between states and as between the different types of privilege they afford. In some cases the scope of conduct covered by the immunity is limited on the face of the provision. In others it is absolute on its face, apparently guaranteeing the inviolability of the person.

The Nature of the Crimes and International Law

The arguments in favor of construction in accordance with a state's international obligations are particularly pertinent here. States are prohibited from guaranteeing immunity for certain types of crimes under international law. For example, the Genocide Convention explicitly states that the provision for persons committing genocide to be punished applies "whether they are constitutionally appointed leaders, public officials or private individuals". Moreover, as set out above, states have duties under international law to investigate and prosecute certain serious crimes, without regard to the status of the person committing the crimes; providing immunity for these crimes is clearly at odds with that duty.

Purposive Limitation

A second and related argument that arises is whether such immunities are, in any event, limited as to their purpose. In other words, the argument is that the constitutional immunities should be understood as either explicitly or implicitly limited to the exercise of the functions associated with the office to which they attach. Some constitutions specifically provide, for example, for the immunity of parliamentarians >for utterances in parliament...= Others expressly exclude conduct 'manifestly not connected the political activity of the member in question,' or which is of a particularly grave nature.



But whether or not explicitly so limited, it has been suggested by some that regard should be had to the objective of the provision, which would seem to be to enable the beneficiary of the immunity to carry out his or her functions unhindered. It was not to facilitate or to guarantee impunity for genocide, crimes against humanity or war crimes. With a purposive approach, it can easily be argued that such crimes, not constituting the official functions of any parliamentarian, government official or head of state, fall outside the scope of the immunity. This of course echoes some of the rationale of the Pinochet case: that, as the immunity for a former head of state under the applicable national law only extended to the exercise of official functions, and torture was not a sovereign function, there was no entitlement to immunity in respect of it.

Preventing Political Interference

In this respect it has been noted that a key constitutional objective in granting immunity was to prevent frivolous or politically motivated interference with the governance of a country. While some would argue that these concerns are valid on the national level, it has been pointed out that they are not valid in relation to the ICC statute, with its complex review and admissibility procedure which provides multiple safeguards against unwarranted interference.

Waiver of Immunities

Another issue which has been discussed relates to the waiver of immunities. Certain states provide, for example, for parliament to waive the immunity and consent to prosecution. Some have suggested that, if immunities can be waived, this has an impact on the question of compatibility of the constitution and ICC statute. Needless to say, if the foregoing arguments as to the inapplicability of immunities to these crimes are accepted, then the question of waiver need not arise. However, some have argued that where such a faculty to waive exists, there is no inherent contradiction between the immunity and the statute. Upon an ICC request for surrender of the person, parliament would have to waive the immunity. Parliament would be expected to exercise its powers consistent with the international obligations of the state (although if it refused to do so, it could ultimately result in non-compliance and a breach of the state's obligations). A second and perhaps more extreme suggestion is that it may be possible to get a waiver by parliament in respect of ICC proceedings on a one-off basis, thereby averting concerns as to the internal difficulties that could arise in the event of consent being withheld in any particular case.

3 LIFE IMPRISONMENT

In several countries, particularly in parts of Europe and Latin America, the constitutional provisions on penalties have raised questions as to the compatibility of the prohibition on life imprisonment with the penalties provisions of the ICC statute. Some constitutions contain an express prohibition on 'life' or 'perpetual' imprisonment, while others specify maximum periods of imprisonment. In certain contexts this is presented as a matter of constitutional right, with the underlying principle being the right of the convicted person to rehabilitate him or herself. This is a difficult issue on which debate and thinking is perhaps less developed than in relation to the other two issues identified. Some preliminary ideas that have been discussed in various contexts are set out below.

Life Imprisonment in the State in Question

Firstly, it is recalled that, as provided for in Article 80, the penalties provisions of the statute will not affect the inclusion or prohibition of particular penalties in national law. State party cooperation with the Court would therefore never involve the obligation to enforce a judgment of life imprisonment. To safeguard this, Article 103 of the statute specifically provides for a state to attach conditions to its acceptance of sentenced persons for enforcement purposes. This ensures that states with such a prohibition will never be required to execute a sentence of life imprisonment on its territory.



Non-applicability to an International Court

Nevertheless, it has been pointed out that this guarantee does not circumvent the more difficult situation where a state is asked to transfer a suspect to the Court, with the possibility that a sentence of life imprisonment will be imposed. In this respect, however, it has been argued in certain contexts that the prohibitions that apply in the domestic context and, by association, to extradition to foreign courts are inapplicable to an international court. The objective of the constitutional provisions was to enshrine certain protections in the domestic context, and to ensure that where someone was extradited to a foreign court, those courts would meet similar standards. With an international court exercising international jurisdiction over crimes which are international in nature, those national standards are no longer the relevant criterion. Certain commentators have referred to the human rights objective of these constitutional provisions. In the ICC context, the internationally recognized human rights of the accused are absolutely guaranteed.

Mandatory Review

An alternative approach which has been discussed in various contexts focuses on the relevance of the review mechanism in Art 110 of statute. This provides for mandatory review when the person has served two thirds or 25 years of his or her sentence. It has been suggested, therefore, that the imprisonment imposed by the Court will not in fact be for 'life' or indefinite, despite the reference to life imprisonment in Article 77. The list of factors to be taken into account by the Court in deciding whether to release, as set out in the statute, is non exhaustive and is likely to be elaborated upon in the Rules of Procedure and Evidence.

Rules of Procedure and Evidence

In addition, some have noted that the Rules of Procedure currently being negotiated at the ICC Preparatory Commission may be relevant in this regard. Proposals have been submitted in relation to Article 77 and Article 110, concerning the factors that the Court will take into account in determining the sentence and in exercising its review functions. Some hope that negotiations on these issues may result in Rules which clarify the exceptional nature of life imprisonment (consistent with Article 77 of the statute) and the fact that the Court will have regard at appropriate stages to various factors including the rehabilitation of the convicted person, which is the principle that the constitutions in question seek to protect.

International Standards and the Principle of Rehabilitation

It has also been pointed out that under the statute the Court will apply international treaty law, and in applying the statute and other sources of law, it will do so consistently with internationally recognized human rights law (Article 21(1) and (3)). As such, the Court will therefore have regard, for example, to the International Covenant on Civil and Political Rights which provides, at Article 10(3), that the essential objective of a penitentiary system should be rehabilitation. It has been suggested therefore that in the review process and the application of the non exhaustive list of factors identified in Art 110(4), the Court would consider the underlying principle of rehabilitation.

4 CONSTITUTIONAL REFORM AND RATIFICATION.

The foregoing focuses on ways to read the ICC statute harmoniously with the constitutional provisions in question. However, if this is not possible, and the view is taken that the tensions cannot be resolved through interpretation, then amendment must be made. The importance of the ICC --its enormous potential to limit impunity and deter atrocities -- is such that, whatever the political or procedural difficulties that may exist, they are not an excuse for failure to ratify. If amendments are to be made, the challenge would then become how this can most effectively be



done, and whether the experience of other states, such as France which has already completed its constitutional amendment, might present a valuable model that can be tailored for use by others. Another question that would arise is when it must be done. In this respect, some interesting experience has emerged in recent months. A number of states have long taken the view that implementing legislation can be enacted after ratification. Recently, in respect of constitutional reform also, it has been suggested that ratification can come first, with amendment as soon as the national procedure allows. Provided amendment takes place before the Court becomes operational, any potential conflict is avoided. This experience will be particularly important in those states where national procedures are lengthy and likely otherwise to lead to excessive delays in ratification.

SUPPLEMENTARY READING 18

The importance of incorporating internal legislation related to the International Criminal Court

Irune Aguirrezabal Quijera

*Conference on International Criminal Justice, held in Mexico D.F.
Paper read February 24, 2000*

To begin, I would like to congratulate the organizers of this wonderful conference. I am grateful that they have invited me to participate, and hope to contribute to the achievement of their objective: to disseminate information about the ICC with the goal of raising the public's consciousness concerning the importance of the signing and ratification of the Statute, and to present the difficulties of this process as well as possible solutions. I would also like to take advantage of this moment to encourage you to launch the Mexican Platform for the International Criminal Court, ICC.

My paper will deal with the importance of incorporating internal legislation related to the International Criminal Court. I propose, first, to lay out a general overview of the matter, and then indicate, though not exhaustively, some concrete norms related to this incorporation of internal legislation.

The International Coalition for the ICC launched the major part of its Campaign for the ratification of the Statute in 1999. The Campaign is directed to States and urges them to promptly sign and ratify the Statute. In addition, the Campaign also encourages them to incorporate the necessary legislation to prevent any incoherence or ambiguity at the moment that the ICC comes into operation, that is, when the 60 ratifications necessary for it to take effect are obtained.

All efforts aimed at creating an ICC are based on the aim that the Court be able to put an end to the impunity of criminals who have committed the most serious crimes against humanity, crimes considered to be a threat to the peace, security and well-being of the world. It is true, however, that the ICC is only a last resort, the Rome Statute is founded on the principle of complementarity; it is not the ICC's mission to substitute national jurisdictions, but rather to complement them, as is established in the Statute's Preamble and Article 1. Thus the ICC will only act when the responsible national jurisdictions are unable or unwilling to exercise their



obligation to investigate and try the alleged criminals of those crimes defined in the Statute: genocide, war crimes and crimes against humanity.

Therefore, the Statute establishes a procedure which aims at putting an end to impunity through both the national courts and the ICC:

1. Through the national courts:

To begin with, the States have the fundamental responsibility to investigate, pursue and try the alleged criminals found in their jurisdiction. In order to carry out this function, however, the States must demonstrate that they are able to investigate and try those crimes described in Article 5 and the following Articles, in accordance with the norms recognized by International Law and by the Statute. In order to do this, the States must incorporate legislation related to the Court which will allow them to develop their functions correctly. Thus it is recommended that the national criminal codes include definitions comprehended in the Statute, that the States ensure that their legislation does not recognize a higher due process for those accused of perpetrating such crimes, from among those processes for common criminals, that their legislation incorporates norms which guarantee the rights and protection of the victims, witnesses and their families, etc., norms which facilitate surrender of the accused, and incorporates as well the general principles of international law, the concept of international judicial assistance, etc.

As such, as concerns the General Principles of International Law, defined for the first time in the Statute, the internal legislation must integrate, among others: the principle of equality before the law (non-immunity), the inability of those crimes to lapse (once the Statute takes effect), the principle of legality (*nulla pene sine lege*), or individual criminal responsibility (principle of subjective accusation). Regarding international assistance, the internal law must incorporate the concept of international assistance between the State and the ICC as set out in the Statute, a concept which differs from the traditional international assistance between States (based on reciprocity, and subject to exceptions founded in internal law, and therefore, although traditional international assistance might serve as a learning experience, it may not be adopted as a model for the ICC because it would immobilize the ICC). If the States do not incorporate such norms as referred to above, Articles 17 and 20 of the Statute will be applied, which determine the admissibility of *jura** case before the Court.

2. Through the ICC:

The investigation and trial of those crimes defined in the Statute may only be carried out by means of the cooperation and judicial assistance of the party States. As Antonio Cassese, President of the International Court for Ex Yugoslavia, pointed out, "unlike national criminal courts, the International Court does not have at its disposal forces to apply its resolutions, which means that without mediation by national authorities it cannot execute arrest orders, it cannot gather material for evidence, it cannot obligate witnesses to testify, it cannot carry out searches in the places where the crimes have allegedly taken place, etc. For these reasons, the court must abide by national authorities and request that they adopt appropriate measures."

Following his words, we may say that the effectiveness and independence of the ICC reside in the success with which norms and obligations stipulated in the Rome Statute are incorporated into internal law. As we have seen, this incorporation will affect both national proceedings to put an end to these crimes, as well as national norms which will allow the



States to cooperate with the ICC.

At present, there exist differences between the norms contemplated in the majority of national legislations and those norms established in the Statute. We are aware that there are no single magical formulas, that the process of adapting national legislation to the Statute depends on each State. There will be States that will need to amend even their Constitution; States which will need to modify and adapt their internal legislation before ratifying the Statute; others which undertake reform in phases, (as in the case of Switzerland, reforming some norms before ratifying the Statute and others once the Statute was ratified); and finally, there are States, as in the case of Italy, whose legislation allows for the ratification of an international treaty and the undertaking of necessary legislative reforms subsequently. Each State will take into account its individual norms as it adapts/ incorporates rules related to the ICC.

The degree and type of legislation will be different for each State, depending on their juridical-constitutional framework. All States, however, must respect a general rule: States are prohibited from incorporating reservations, (Article 120) so that all requirements established in the Statute are the same for all States, which we consider to be a major success of the Rome Conference.

The Coalition does not intervene regarding the model to follow. Nevertheless, it insists on the general necessity to incorporate the necessary legislation so that the ICC may work effectively and rapidly, in accordance with the highest levels and principles of procedural and criminal justice.

The experience of the International Criminal Court for Ex Yugoslavia has taught us that it is useless to establish a court if it is not granted the mechanisms necessary to permit its development and execution of its jurisdictional functions. It is with that in mind that the issue of effectiveness is clearly fundamental. We cannot create an ICC if we do not grant it the resources (including financial resources) and the mechanisms necessary for it to be operative.

Taking into account the fact that the ICC will have to depend on the party States to carry out activities in their respective territories, such as collecting data, evidence, official documents, investigations, arrests of suspects, etc., the crucial problem is: To what extent will the party States submit themselves to the general obligation of cooperating with the Court?

The Statute sets out in Part 9 - Articles 86 through 102 - its section dedicated to International Cooperation and Judicial Assistance (of course, other obligations to cooperate exist outside of those set out in Part 9, such as the execution of a sentence by the States, optional**, crimes against the administration of justice which will be mentioned briefly below). Part 9 of the Statute formulates the political compromise reached in such a delicate issue. So that the ICC can carry out its functions effectively and independently, it has imposed on the States a general obligation to cooperate with the Court and has limited the exceptions to that obligation.

The essence of the States' obligations to cooperate with the ICC is subject to the principle of States' consent. In the case of ad hoc courts, this obligation arises from a Security Council resolution, in accordance with Chapter VII of the Charter of the United Nations (Res. 827 of 1993 and Res. 955 of 1994); in the Rome Statute, the States' obligation to cooperate with the Court is based on the States' consent, granted by means of their ratification of the Statute.



Inherent in its consent to an international treaty is the State's compromise to fulfill the obligations stipulated in that treaty, as reflected in the basic principle *Pacta sunt servanda*.

In addition, however, as Amnesty International points out, the 160 States that participated in the Rome Diplomatic Conference, in adhering to the Statute by means of its ratification, accept that the International Criminal Court is an impartial entity whose substantive law* and due process satisfies their inherent interests. It must be kept in mind that the ICC will not be an organ of the United Nations, but rather a common judicial organ for the party States. It is based on this that the States should support, cooperate with and assist the ICC as they do with their own national courts. It is only in this way that a just and effective ICC can be created.

imparcial cuyo derecho sustantivo y garantías procesales satisfacen sus intereses

The operation of the Court will be regulated by the rules found in the Statute and by the Rules of Proceedings and Evidence which are still being discussed in the Preparatory Commission. We will now analyze the legislation needed to fulfill the obligation of cooperation with the Court.

1. The States' general obligation to cooperate with the ICC (Articles 86 and 87)

The party States must cooperate with the Court without delay, in all phases of the proceedings (investigation/ trial). It is clear that any delay can result in the obstruction of justice, especially in the context of criminal trials such as these where the evidence, testimonies and other elements can be destroyed, lost or whose value may diminish with the passing of time. No State that has ratified the Statute may invoke internal law as a cause for exception to its obligation to cooperate with the Court (as is set out in the Vienna Convention on the law of treaties, Article 27). *Convenio de Viena sobre el derecho de los tratados, artículo 27*).

This obligation to cooperate affects any national authority - police, judicial, military; any level of administration - national, regional, local, etc. The simplest way to prevent ambiguities is to have the party States review military and civil jurisdictions.

The States should keep requests confidential.

The Court may impose measures to protect information, in order to ensure the safety of the witnesses, victims or their families.

The Court may invite a nonparty State to cooperate, based on an ad hoc agreement or by another appropriate mode. The same request for cooperation can be used for any intergovernmental organization, to facilitate information and documentation. If a party State (or a nonparty State which has reached an agreement with the Court) does not fulfill its obligation to cooperate, the ICC may take the case to the Assembly of party States, or if the case was referred by the Security Council, to the Security Council itself.

2. The party States are obligated to ensure that existing procedures of their national legislations permit all forms of cooperation with the Court.

The legislation necessary will depend on each State, on the existing legislative and constitutional framework of each case. The States are obligated to analyze areas where new legislation will be



necessary, identify obstacles and remove them (Article 88).

Many constitutional systems require a review of internal legislation to analyze compatibility of their internal laws with the norms required by an International Treaty, in which case the treaty is referred to the corresponding consulting body (governmental or jurisdictional). Given the extent and complexity of the Statute's rules, many States have opted for previous ratification, without yet modifying their internal legislation. These States have taken into account the fact that 60 ratifications are needed before the Court can be put into effect, and therefore have time to undertake reforms. But the Statute is clear: the States must modify proceedings comprehended in internal law so that all forms of cooperation with the ICC are possible.

3. Cooperation under Part 9

The most important obligations concern arrest and surrender of persons

The national legislation should allow the arrest and surrender to the Court of those persons required by the Court as suspects of the crimes described in Article 5.

The form of extradition contemplated in the Statute should be distinguished from the traditional form of extradition between states. For this reason, it is preferable to speak of "surrender", as the Statute itself does in describing both in Article 102, which refers to the surrender of a person by the State to the Court.

Although the Statute allows the States to keep the traditional terminology (as it seems that Canada has, maintaining the term "extradition" in its law and ratification project), it requires that the obligations derived from the Statute be fulfilled. Therefore, the legislation regarding surrender of suspects to the Court may not be more complicated than that of traditional extradition, but rather, simpler and more agile proceedings should be incorporated.

In general, it may be necessary that States reform their legislation regarding extradition or mutual assistance, given the fact that legislation for extradition between states cannot be effective for the Court, due to the slowness of its procedures, the cost involved and above all, to prevent violation of the Statute.

As such, the majority of legislations include banning the extradition of a citizen to another country. This exception cannot be claimed in the case of the Court, since, as referred to in the concept noted above, the Court is a judicial organ common to all party States, as all States participated in the adoption of procedural norms and due process. As such, the term "surrender" is preferred to "extradition", to quell all doubts.

Neither may it be claimed that a State's internal law prohibits imposing a sentence of life imprisonment sentence, as a reason to refuse the surrender of a person to the Court. In addition to the argument mentioned above of nationality, as is noted in the report attached to the parliamentary debate of the Norway's ratification law, the crimes considered are the most serious crimes against humanity, not the crimes the internal legislators considered at the moment of limiting prison sentences. In any case, the Statute only establishes this sentence for exceptional cases, submitted for review after 2/3 of sentence is completed, or as a maximum, after 25 years imprisonment. Sentenced criminals would be expected to complete sentences higher than those allowed by internal law, but if States accept the Statute, they could not impose conditions which would affect the sentence imposed by the Court.



Any non bis in ídem allegation provided by the suspect to the required State should be resolved by the Court, and not by that State, applying the principle of primacy of the Court.

The national legislation should permit the transfer of a suspect through a territory of a party State.

Regarding requests for concurrent surrender/extradition by a State and the Court, if the State is a party State, the principle of the Court's primacy should be applied, as in the circumstances set out in Article 90. The conditions under which a person would be surrendered to the Court are determined by the rule of specialty, with respect to other crimes committed beforehand by the same person. The due process established in Article 59 regarding the arrest should be guaranteed by the States when complying with this type of order from the Court.

National legislation should comprehend the States' obligation to inform the preliminary court of any application of a decision which involves provisional liberty, and should take into account the preliminary court's recommendations, keeping in mind that the crimes being dealt with are the most serious crimes against humanity.

Other Forms of Cooperation

1. National legislation should:
 - Identify any potential problem regarding the transfer of specific evidence (weapons, human remains, etc.) when legislation normally limits its exportation.
 - Guarantee that the prisoners interrogated are aware of their rights before the interrogation, Article 55, the right to know the charges, the right to remain silent, the right to a lawyer, etc.
 - Guarantee that necessary measures can be adopted which will allow for the protection of victims, witnesses or their families, and guarantee as well the preservation of evidence, including those measures which allow for freezing accounts, property, etc., directly or indirectly related to the crimes committed.
 - Incorporate rules which facilitate prompt, simple and efficient consultation processes for all proceedings, and fundamentally, each time the State identifies problems or obstacles to its cooperation with the Court.
2. If there exists a fundamental rule which prevents the State from complying with the Court's request, attempts - in conjunction with the Court - will be made to resolve the issue immediately.
3. If a State refuses to comply with a Court's request for cooperation, the State should inform the Court or the Prosecutor of the reasons for its decision.
4. The Statute sets out three limits to the obligation to inform the Court and fulfill its request.
 - 1) For national security, as long as all reasonable measures set out in Article 72 have been adopted.
 - 2) Article 98, when the ICC's request for the surrender of a suspect is incompatible with obligations the State has contracted with a third State, unless the Court can obtain the cooperation of that third State.
 - 3) With requests to submit documents which were confidentially submitted to a State by a third State, Article 73

4. Incorporation of internal rules, not included in Part 9



The general obligation to cooperate applies to all parts of the Statute. In addition, national legislation should allow for:

- The Court to exercise its functions and jurisdiction in the territories of any party State.
- No distinction with regards of the office of the accused, Article 27. Immunity for chiefs of State, members of parliament or the Senate, the President, Prime Minister, military officers, etc. may not be invoked with respect to the crimes comprehended by the Statute. Norms which allow a State to cooperate with the Court in the investigation of these type of people should be incorporated.
- The Court to investigate, try and pursue all crimes against the judicial process as set out in Article 70.

Sentences and the carrying out of sentences, Part 10

The obligations related to the carrying out of sentence only refers to those party States that have voluntarily offered for those sentences to be carried out in their territories, and have thus accepted the condemned persons.

Nevertheless, States which agree to have sentences carried out in their territories may not impose conditions on the Court which will affect the length of the sentence or which will allow for a review or an appeal of the sentence issued by the Court. The carrying out of the sentence will also be subject to the Court's supervision. The State should guarantee the levels of prisoners' treatment, as set out in international treaties, Article 106. The rest of the obligations concerning sentences and fines apply to all party States. National law should accept requests for compensations or rehabilitation.

As we have seen, there are many obligations imposed on the party States. For this reason, it is important that the process of ratification be accompanied by a process of incorporation/adaptation of the national legislation to the Statute.

As such, the Coalition of NGOs for the ICC considers that the conferences between groups of experts from different countries have a very positive effect, as they encourage interchange of experiences and the search for common legislative and constitutional problems.

Allow me to conclude by pointing out, from my point of view, the most relevant consequences produced by the incorporation of internal legislation related to the ICC:

Firstly, there will be a clarifying and unifying effect. A homogenization of criminal legislation of party States will be produced, not only regarding the definition of crimes, but also regarding procedural law, defense laws, general principles, etc. In fact, this effect can already be noted in the legal and political debates produced in almost all cases of States, in legislative, executive and judicial branches, as well as in military institutions, with clarifying and preventive results.

In the second place, the most positive effect of the incorporation of internal legislation related to the Statute lies in the fact that the States will analyze aspects of their legislation's substantive* criminal law concerned with human rights and international humanitarian legislation from a wider point of view. This impact will reach beyond its application to the Rome Statute. The result could entail the incorporation of other international instruments in internal legislation, such as the Geneva Conventions, the Convention against Torture, etc.



Finally, thanks to the internal incorporation of legislation related to the ICC, we will be achieving the effect sought in the Statute's Preamble: ensuring the peace, security and well-being of the world.



SUPPLEMENTARY READING 19
THE INTERNATIONAL CRIMINAL COURT:
Summary Checklist for Effective Implementation

Amnesty International

Part 1. Complementarity:

I. DEFINING CRIMES, PRINCIPLES OF CRIMINAL RESPONSIBILITY AND DEFENCES

1. Legislation should provide that the crimes in the Rome Statute, including other crimes under international law, are crimes under national law.

2. National courts should be able to exercise universal jurisdiction in all cases of crimes under international law.

3. Principles of criminal responsibility in national legislation for crimes under international law should be consistent with customary international law.

4. Defences in national law to crimes under international law should be consistent with customary international law.

II. ELIMINATION OF BARS TO PROSECUTION

5. No statutes of limitations are permitted.

6. No amnesties, pardons or similar measures of impunity by any state should be recognized.

7. Immunity of officials from prosecution for crimes under international law should be eliminated.

III. ENSURING FAIR TRIALS WITHOUT THE DEATH PENALTY

8. Trials must be fair.

9. Trials should exclude the death penalty.

Part 2. Cooperation:

I. BASIC OBLIGATION TO COOPERATE

10. National courts and authorities must cooperate fully with Court orders and requests.

II. STATUS OF THE COURT IN NATIONAL LAW

11. The Court must be authorized to sit in the state.



12. *The legal personality of the Court must be recognized.*

13. *The privileges and immunities of the Court, its personnel, counsel, experts, witnesses and other persons whose presence is required at the seat of the Court must be fully respected.*

III. NOMINATION OF CANDIDATES TO BE JUDGES OR PROSECUTOR

14. *States should ensure that they nominate candidates to be Judges and the Prosecutor in an open process with the broadest possible consultation.*

IV. FACILITATING AND ASSISTING COURT INVESTIGATIONS

15. *When the Prosecutor has deferred an investigation, states shall comply without delay to requests for information.*

16. *States shall give effect to acts of the Prosecutor or warrants issued by the Court prior to an Article 19 challenge to jurisdiction or admissibility and to actions by the Prosecutor to preserve evidence or prevent an accused person absconding pursuant to Articles 18 (6) and 19 (8).*

17. *States should facilitate the ability of the Office of the Prosecutor and the defence to conduct investigations in the state without any hindrance.*

18. *National legislation should not contain grounds for refusal of requests for assistance by the Court in connection with investigations and prosecutions.*

19. *National authorities must provide a broad range of assistance to the Court, as outlined below.*

A. Assistance related to documents and records, information and physical evidence

- a. Locating and providing documents and records, information and material evidence requested or ordered by the Court.*
- b. Preserving such evidence from loss, tampering or destruction.*
- c. Serving any documents requested by the Court.*

B. Assistance related to victims and witnesses

- d. Assisting the Court in locating witnesses.*
- e. Providing victims and witnesses with any necessary protection.*
- f. Fully respecting the rights of persons questioned in connection with investigations of crimes within the Court's jurisdiction.*
- g. Assisting the Court by compelling witnesses to testify, subject to any lawful privilege, at the seat of the Court or in the state.*

C. Assistance related to searches and seizures

- h. Facilitating searches and seizures of evidence by the Court, including the exhumation of graves, and the preservation of evidence.*
- i. Assisting in tracing, freezing, seizing and forfeiting assets of accused persons.*
- j. Providing any other assistance requested or ordered by the Court.*

V. ARREST AND SURRENDER OF ACCUSED PERSONS

20. *States parties should ensure that there are no obstacles to arrest and surrender.*



21. *National courts and authorities must arrest accused persons as soon as possible after a request by the Court.*
22. *National courts and authorities must fully respect the rights of those arrested at the request or order of the Court.*
23. *National courts and authorities must surrender arrested persons promptly to the Court.*
24. *States should give priority to requests for surrender by the Court over competing requests by other states.*
25. *States must permit transfers of accused persons through their territory to the seat of the Court.*
26. *States must not retry persons acquitted or convicted by the Court for the same conduct.*

VI. ENSURING EFFECTIVE REPARATIONS TO VICTIMS

27. *National courts and authorities must enforce judgments and decisions of the Court concerning reparations for victims and should provide for reparations in national law for all victims of crimes under international law in accordance with international standards, including the general principles established by the Court relating to reparations.*

VII. TRYING CASES OF OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE

28. *Legislation must provide for punishment of offences against the administration of justice by the Court.*

VIII. ENFORCEMENT OF SENTENCES

29. *Legislation must provide for enforcement of fines and forfeiture measures.*
30. *Legislation should provide for the enforcement of sentences by the Court, in accordance with the requirements set forth below.*
 - a. *Conditions of detention must fully satisfy the requirements of the Statute and other international standards.*
 - b. *Legislation should provide for release of the convicted person on completion of sentence or on order of the Court.*
 - c. *Legislation should provide for the transfer of persons on completion of sentence.*
 - d. *Legislation should limit prosecutions and punishment for other offences.*
 - e. *Legislation should address the question of escape.*

IX. PUBLIC EDUCATION AND TRAINING OF OFFICIALS

31. *States parties should develop and implement effective programs of public education and training for officials on implementation of the Statute.*

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SUPPLEMENTARY READING 20
THE ROLE AND AGENDA OF ORGANISED CIVIL SOCIETY IN
THE PROCESS OF ESTABLISHING THE INTERNATIONAL
CRIMINAL COURT

Alda Facio

Thanks. I would also like to add my thanks to those expressed by the previous speakers, to the organisers who have invited me here to speak out on behalf of the thousands of women who have participated directly or indirectly in the negotiations for the establishment of an International Criminal Court through their involvement in the “Women’s Caucus for Gender Justice in the ICC”. I also want to give thanks on behalf of the work we are undertaking in Latin America to achieve, not only that our countries ratify the Statute, but also the active participation of thousands of women in its establishment, activities which we co-ordinate through ILANUD’s Women, Justice and Gender programme.

But before addressing the panel theme, I want to take advantage of having the microphone to explain that this caucus has been denominated “Women’s Caucus” in plural rather than singular for ideological and not purely grammatical reasons. By using the plural, we want to highlight the fact that there are a lot of women, each one very different from the next and thus no one woman, nor one individual woman’s ideal can represent all of us. By using this name, we also want to reiterate that what we want is for the gender perspective to be included in all aspects of justice and human rights, and not solely in those areas that traditionally have been considered to rest with women. It is precisely because of such human diversity that we are trying to influence in all aspects of the negotiations, in the hope that all needs and aspirations, men’s and women’s alike, can be included in this effort.

Although the focus of this panel is on the strategies we are employing in the different organisations to achieve ratification and to increase civil society’s awareness and knowledge of the Court, I’m going to take the liberty of talking to you, also as a strategy, about the progress that was made in terms of gender in the Statute of Rome. I know that Mariclaire has already spoken about what a major achievement she considered the incorporation of the gender perspective in the Statute of Rome to be, and that Eduardo spoke to you this morning about the crimes of sexual violence that we women managed to get included, both as war crimes and as crimes against humanity. However, I’m convinced that in the process of the establishment of the ICC, a series of further gains have been made from a woman’s viewpoint which in my opinion are historic. Perhaps the most significant is that it is the first time the word **GENDER** appears in an international legal instrument, a word that means much more than simply “woman”, although a lot of people use it synonymously. To succeed in maintaining this word we had to give a lot of ourselves, working 18 hours a day. We were successful despite the Christian and Islamic fundamentalists and despite the Vatican, all of whom, as usual, were opposed to the inclusion of this word in the Statute, arguing that it is ambiguous and could lead to the admission of a large number of unacceptable sexualities.

I was present throughout the three days the negotiations of this word lasted and I can assure you that it was by no means easy. The power of the fundamentalists and the Vatican, united in the ignorance surrounding this term, were difficult obstacles. And as with all negotiations, we only



managed to gain inclusion of the word gender on the condition that a definition also be included in the third paragraph of Article 7. We have been criticised by a number of feminists for allowing an incorrect definition and not stating that gender refers to a series of values, attitudes and norms which make up society and not to the biological make-up of men and women. The definition that was included states that “For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above”. It is true that this does not exactly explain the meaning of gender, however in my opinion it is an innocuous definition. And taking into account that the term appears a number of times in the Statute, something which is beneficial to us, we can consider its inclusion a victory. Furthermore, this achievement has already brought about specific, positive effects – with persecution on the grounds of gender now being a crime against humanity, many women have gained political asylum in another State, when if they had remained in their own communities, they would have been subjected to genital mutilation.

Another victory for those of us feminists present in Rome either in our capacity as official delegates or as activists, was that we gained the inclusion of a principle that states that the Statute cannot be interpreted or enforced in such a way that it has an adverse impact on the grounds of gender, amongst others. Something which occurs, has occurred and continues to occur in courts the world over.

The Statute includes sexual violence no longer as an attack against honour, as it appears in the Geneva Conventions, but as a crime of comparable gravity to torture, enslavement etc. Also, as Eduardo already mentioned this morning, the Statute typifies a further series of crimes which are not contemplated in the Geneva Conventions, although they have been committed ever since the beginnings of Patriarchy both in times of war and in times of apparent peace. They are the following: sexual slavery, enforced prostitution, forced pregnancy, (which of course was the most controversial issue), enforced sterilisation and any other form of sexual violence of comparable gravity to the other crimes. Furthermore, all of these forms of sexual violence can be brought to trial either as torture, genocide, enslavement etc. or as sexual violence. This is a very important point for us because in general, sexual rape and these other crimes do not tend to be considered real crimes by prosecutors and judges and therefore, if these acts are brought to trial as torture, for example, it is more likely that the seriousness of the harm inflicted, both on the victim and on society at large, is understood.

The attack on the inclusion of forced pregnancy was led by the Vatican, in a concerted effort to get this crime excluded from the Statute. They were unsuccessful in their efforts as a result of women mobilising themselves in their respective countries to ensure that their governments honoured the agreements they had entered into at the World Conferences in Vienna, Cairo and Beijing. As with the gender term situation and following a number of days of negotiations, the delegations led by the Vatican accepted the inclusion of this crime in Articles 7 and 8 only if they were defined as “the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting the national laws relating to pregnancy”

Another very important step forward was that there should be **fair representation** of male and female employees in the court. How “**fair representation**” will be interpreted we can not know. What might happen is what happened this morning when a Mexican public official insisted that Mexico should not be hasty in signing the Statute. According to this man, the fact that two years have passed since the Statute was adopted, with Mexico still not having signed is due to Mexico not being *hasty*. Maybe there are some civil servants with a similar logic to that of the speaker



this morning who consider “**fair representation**” to mean one female judge to every 18 male ones. That is why it is important that the different organisations who fight for human rights from a gender perspective monitor the nominations to ensure that this doesn’t happen. And of course we will use this opportunity to also demand that the nominations, be they male or female, over and above meeting the criteria established in the Statute should be men and women who are renowned for passionately defending the human rights of all us beings who inhabit this planet.

In Rome it was also achieved that amongst the judges there be expertise in violence against women and children. We wanted this to be expertise in gender violence, because this obviously includes the violence perpetrated against men for being men, such as enforced conscription. However, once again thanks to the Vatican and its followers, it was necessary to negotiate and the result was “women and children”, adult men thus remaining unprotected. I think this is largely due to the ignorance surrounding the term “gender”. For the majority of the official delegates, gender violence and violence against women are identical concepts. Really, I’m convinced that men should find out more about what this gender term is, given that it affects them too, bringing them privileges granted, but at what price!

The Statute also includes the requirement for an expert in gender to be available in the Prosecutor’s Office, to advise the Prosecutor on prosecutions involving sexual violence and also advise female victims and witnesses.

The Statute contemplates the creation of a Victim and Witnesses Unit to provide protection, security, counselling and assistance to victims and witnesses, as well as any other person who could be at risk on account of testimony given. The Statute also gives the Court the power to award reparations to victims including restitution, compensation and rehabilitation.

We are using these achievements and others to engage the interest of a greater number of women in the activities surrounding the establishment of the ICC. And not just female lawyers or leaders, we want lots of women of all colours and walks of life to join the campaign for the ratification of the Statute. I’m convinced that the campaign can also be used to specifically state to the population at large the need to bring an end to the impunity surrounding these and other crimes, generally committed by those who hold the greatest amount of power. I also believe that it creates a space in which to open up debate on such important issues as the death penalty, the participation of victims of crime in criminal processes, the significance of restitution and compensation to victims, that is, the role of the criminal process in our society.

It goes without saying that we feminists don’t only fight for those issues that tend to be marginalised because they exclusively affect or tend to more affect women. We also fight for those that are of interest to or should be of interest to anyone who cares about human rights; such as the abolition of the death penalty, which was achieved; a Prosecutor’s Office independent from the Security Council, which was also achieved, although not so convincingly; or the banning of nuclear weapons, which was not achieved; and in general for an efficient, independent, universal and impartial Court. We feminists know that if a court does not include the gender perspective in all of its workings, leaving out the needs of one half of the human population and including those of the other half as if they were a paradigm of humanness, it cannot be independent, impartial, universal or efficient. Without a gender perspective, the workings of a court are not impartial because they are partial to the masculine gender which is taken to be the parameter or model of what humanness is. It isn’t universal because it doesn’t include all individuals. It isn’t independent because it is subject to sexist values. And it isn’t efficient because it can’t deal with all the elements that make up the crimes and acts that are committed on the grounds of symbolic, social or structural gender.



Right, after this long introduction that I've allowed myself, given that this theme was not officially included in this seminar, I will now quickly move on to tell you about what we feminists are currently doing. Needless to say, one of our activities is the participation in the on-going negotiations on the elements of the crimes and procedures at the UN Headquarters in New York, to ensure that the gains we made in the Statute don't get limited in any way. We feel that in the process of defining the elements of crime, what we consider to be achievements could be significantly reduced or limited. For example, establishing that for an act to constitute a crime of sexual violence, there has to be a penis involved. There are so many other ways to rape a woman! We also need to guarantee the greatest amount of access possible to the proceedings for victims.

Another activity which we are trying to set up is the creation of a Latin-American local branch of women which would form part of the Women's Caucus (which is also part of the coalition) to be able to work in castilian. We have seen that one of our problems is that, because they do not speak English, very few women from our region have been able to participate in the negotiations in New York. Thus, the branch that we want to establish would work very closely with the Latin-American Caucus and the Women's Caucus. It would be my wish that in other regions, further local women's branches be established who would participate in the general caucus and in the regional caucuses. It is still too early to predict what future these local branches might have.

Those of us feminists who are involved in all of this, be it as independent activists or as part of the Women's Caucus, as participants in the ILANUD's Women, Justice and Gender Programme or as a local branch, back the campaign for ratification of the Statute that is being co-ordinated by the Coalition. We believe that women should not have their own separate campaign, because the Coalition's campaign has been very well planned and we think that it would only lead to confusion if we ran a separate campaign. We support the campaign in a number of different ways: increasing awareness of the campaign, participating in all of the seminars we are invited to for our expertise, creating legal doctrine from a gender perspective in this extremely new field of International Criminal Law etc. With the support of the Andean Regional Office of UNIFEM, my programme at ILANUD has designed a training manual on International Humanitarian Law, the International Criminal Court and Women which we have already substantiated in workshops in Colombia, El Salvador, Ecuador and Guatemala. These workshops were aimed both at women, as well as at judges (male and female), parliamentarians and other public officials, with the aim of introducing them to the issues which are of particular interest to us, but also to introduce them to other aspects of the International Criminal Court.

We have been making short radio spots which will be broadcast on all the women's radio stations in Latin America to appeal to women to support the Court. We have a quarterly news bulletin which talks about the progresses being made for women in the ad hoc tribunals as well as in the ICC negotiations. We carry out urgent actions, appealing for the women's support the world over, like the one we did in Rome when there was a move to eliminate the word gender from the entire Statute. This alert or urgent action provoked such an avalanche of faxes and e-mails that they were decisive in causing those delegates who had not initially committed themselves either for or against the word gender, to change their stance and step in to save it. We have also succeeded in gaining that in the Beijing Platform evaluations, the indicator used to determine whether a State has complied, will be if it has signed the Rome Statute. We are joining other campaigns that are on-going at present, such as the "From the Village Council to the Negotiating Table" campaign. This campaign is for the inclusion of women in the peace negotiation tables and we have asked them to include the demand for signature and ratification of the International Criminal Court in their campaign.



Another space that we have been using to promote ratification of the ICC is what we call the **16 Days of Activism for Women's Human Rights**, a world-wide campaign which runs every year from the 25th of November, **World Non-Violence Against Women Day**, until the 10th of December, International Human Rights Day. We appealed to women the world over, that when planning activities for these sixteen days in '98, '99, as well as in the current year 2000, they included a demand for ratification of the ICC Statute in their campaign.

In New York, we have organised panels on victims' and witnesses' participation in ad hoc international tribunals, so that the delegates negotiating the elements and procedures and who have often never set eyes on a victim of armed conflict, have the opportunity to meet them in the flesh and so that the issues directly concerning the victims are not discussed as if the victims were an abstraction. We want the delegates to be able to talk with them, these survivors of acts of atrocity, for them to see what it is all really about.

We feminists are also participating in other caucuses and groupings because, as I said at the beginning of my talk, we cannot talk of "a woman"; we come from all walks of life, we are of all different colours and we have specific interests that differ. Therefore, as I have already said, we also participate in the Latin-American Caucus, the Victims Caucus and we have helped to set up the Caucus for disabled individuals who are also organising to succeed in getting their needs and views incorporated in the elements and procedures, as well as in the process of ratification.

As I see I'm running out of time, I'd like to say that I hope my comments on this list of actions carried out by the feminists will be of use to you all in stimulating further and similar ideas as to what can be done here in Mexico to raise awareness of the importance to the people of this country that Mexico signs and ratifies the International Crime Court Statute. I hope that in the next part of the seminar you will be able to develop strategies so that society wholeheartedly accepts the Statute and so that people see it as a step forward, not only for International Law, but also as one that can change the lives of many real people, right here in Mexico, in other countries in this region and the world over.

I'll end by asking that when you run your campaign here in Mexico, please don't forget the women. Many thanks.



SUPPLEMENTARY READING 21
REPORT ON CONSTITUTIONAL ISSUES RAISED BY THE
RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL
CRIMINAL COURT

*adopted by the Commission at its 45th Plenary Meeting
(Venice, 15-16 December 2000)*

At its 43rd Plenary meeting the Venice Commission decided to study the constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court. A working group composed of Messrs Robert, Özbudun, Hamilton, Van Dijk, Luchaire, Ms Livada, Err and Mr Vogel prepared a draft report in Paris on 1 December 2000. The present report was adopted by the European Commission for Democracy through Law at its 45th Plenary Meeting in Venice, on 15 to 16 December 2000.

Following the Second World War, the powers which emerged victorious established the Nuremberg and Tokyo tribunals in order to bring to account the perpetrators of the most abhorrent crimes that had been committed. The ensuing Cold War did not permit to continue this precedent to be followed in the decades thereafter. It was not until the end of the East-West confrontation that the establishment of two *ad hoc* tribunals became possible: one for the crimes committed in the Former Yugoslavia and one for those in Rwanda. Both these tribunals were established by virtue of Security Council resolutions in application of Chapter VII of the UN Charter.

However, although regional conflicts take place in many parts of the world, it would be impossible to continuously establish *ad hoc* tribunals to bring the perpetrators of such crimes in each area to account. It was thus considered that the creation of such *ad-hoc* tribunals through Security Council resolution could not be regarded as an adequate practice in the long run. It was under such circumstances that the idea of establishing a permanent international criminal court to deal with such crimes committed in all areas of the world was revived. It thus became possible for a Diplomatic Conference held in Rome under the auspices of the UN to adopt in July 1998 the Statute of the International Criminal Court.

This new international court will be an important means of countering impunity and respecting humanitarian law and human rights. It will be used to bring to trial all those who commit genocide, crimes against humanity, war crimes and the crime of aggression.^{10[1]} However, to enter into force the statute must be ratified by at least sixty states. The members of both the European Parliament^{11[2]} and the Parliamentary Assembly of the Council of Europe^{12[3]} have

^{10[1]} In the case of this crime, the Court will exercise its jurisdiction only when a provision will adopted in accordance with articles 121 and 123 of the Statute of Rome. (see, Article 5 of the Statute of Rome).

^{11[2]} See *EU Bulletin 12-1999 (en): 1.1.11.*

^{12[3]} See *Recommendation 1408 (1999), Official gazette of the Council of Europe - May 1998.*



called on their countries to ratify the statute as soon as possible. By 1 January 2001, it had been ratified by 27 states, 11 of which are European^{13[4]}.

Ratifying this type of instrument can pose a number of problems under national law, particularly at a constitutional level. The constitutional problems raised derive first of all from the effect of transfer of sovereignty resulting from the ratification. This question of a general nature, that several European States have already dealt with in the context of the process of European integration (not only in respect of accession to the European Union but also in respect of ratification of some Council of Europe treaties) will not be dealt with in this report, unless where closely connected with specific constitutional problems raised by the ratification of the Statute of Rome. These specific problems relate to: immunity of persons having an official capacity^{14[5]}; the obligation for states to surrender their own nationals to the court at its request^{15[6]}; the possibility for the court to impose a term of life imprisonment^{16[7]}; exercise of the prerogative of pardon; execution of requests made by the court's Prosecutor^{17[8]}; amnesties decreed under national law or the existence of a national statute of limitations^{18[9]}; and the fact that persons brought before the court will be tried by a panel of three judges rather than a jury^{19[10]}.

This report sets out to analyse the reasoning and interpretations that may be relied on by governments to solve these problems and enable their countries to ratify the Rome Statute. Obviously, this reasoning and interpretation are not restrictive and are given simply as indications. They represent merely a methodological reflection and do not commit the European Commission for Democracy Through Law, which does not favour any one solution over the others.

States may consider several solutions for the ratification of the Statute of Rome, despite the presence of constitutional problems. These may include, for example:

- insertion of a new article in the constitution, which allows all relevant constitutional problems to be settled, and avoids the need to include exceptions for all the relevant articles, this is the measure used in particular by France and Luxembourg.
- systematic revision of all constitutional articles that must be changed to comply with the Statute.
- introduce and/or apply a special procedure of approval by Parliament, as a consequence of which the Statute may be ratified, despite the fact that some articles are in conflict with the Constitution^{20[11]}.
- interpreting certain provisions of the constitution in a way to avoid conflict with the Statute of Rome

1. Immunity of Heads of State or Government and others persons having an “*official capacity*”

^{13[4]} Austria, Belgium, Finland, France, Germany, Iceland, Italy, Luxembourg, Norway, San Marino and Spain. It should be noted that since the adoption of this report, on 15 December 2000, two other countries, members of Council of Europe (Austria and Finland), ratified the Statute of Rome.

^{14[5]} Article 27 of the Rome Statute.

^{15[6]} *Idem*, Articles 59 and 89.

^{16[7]} *Idem*, Article 77 (1) (b).

^{17[8]} *Idem*, Article 99.

^{18[9]} *Idem*, Article 29.

^{19[10]} *Idem*, Article 39 (2) (ii).

^{20[11]} See, in particular, Article 91 (3) of the Constitution of Netherlands.



One of the constitutional problems raised by the ratification of the Rome Statute concerns the immunity which most European countries' constitutions grant to the head of state or government, a member of a government or parliament, an elected representative or a government official^{21[12]}. Such immunity may contravene Article 27 (1) of the statute, which provides «*This Statute shall apply equally to all persons without any distinction based on official capacity.*». Their official status in no way exempts these persons from criminal responsibility under the statute, nor does it constitute, per se, a ground for reduction of sentence. The second paragraph adds «*Immunities ... which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*». In other words, where they commit a crime coming within the jurisdiction of the International Criminal Court, political leaders cannot evade their responsibility by pleading immunity before either that court or their country's own courts^{22[13]}.

A number of solutions to this problem of immunity can be envisaged. Firstly, a state has the possibility of amending its constitution to bring it into line with the statute^{23[14]}. This approach has been followed, inter alia, by France and Luxembourg. Both countries added a clause to their constitution providing in the case of France «*the French Republic may recognise the jurisdiction of the International Criminal Court under the conditions set out in the treaty signed on 18 July 1998*^{24[15]}»,^{25[16]} and in that of Luxembourg «*no provision of the Constitution shall constitute an obstacle to approval of the Statute of the International Criminal Court ... and to fulfilment of the obligations arising therefrom under the conditions set out in that Statute.*»^{26[17]}. These clauses are worded in such a way as to permit these countries to avoid creating an exception or exceptions to specific articles of their constitution.

The process of constitutional amendments will also be used by the Czech Republic, where the bill amending the constitution contains the following provision Article 112a): «*As regards crimes, where a ratified and promulgated international treaty binding the Czech Republic provides for the jurisdiction of an international criminal court; a) neither the special conditions provided for the prosecution of deputy, senator, the President of the Republic, and judge of the Constitutional Court, nor the right of deputy, senator, and judge of the Constitutional Court to refuse to give testimony on facts that he gathered in connection with his seat or function shall apply;*»^{27[18]}. However, amendment of the constitution is often a cumbersome, complicated process, and may even be a politically sensitive issue.

^{21[12]} See, in particular, Article 46 of the Constitution of Germany, Articles 57, 58 and 96 of the constitution of Austria, Article 76 of the Constitution of Estonia, Articles 26, 68 and 68-1 of the Constitution of France, Article 75 of the Constitution of Georgia, Article 49 of the Constitution of Greece, Article 20 of the Constitution of Hungary, Article 7 of the Constitution of Liechtenstein, Articles 64, 83 and 89 of the Constitution of "the former Yugoslav Republic of Macedonia", Article 42 of the Constitution of the Netherlands, Article 130 of the Constitution of Portugal, Articles 54 and 65 of the Constitution of the Czech Republic, Articles 69 and 84 of the Constitution of Romania, Articles 83 and 100 of the Constitution of Slovenia, Articles 83 and 85 of the Constitution of Turkey and Articles 80 and 105 of the Constitution of Ukraine.

^{22[13]} States may provide in their national law that the national courts shall be competent to try a leader who has committed crimes within the jurisdiction of the International Criminal Court. This is possible because the statute is based on the principle of complementarity, but, whatever solution is adopted, perpetrators of such crimes cannot plead immunity.

^{23[14]} This solution could be adopted by the Czech Republic, Greece, Hungary, Portugal and Turkey.

^{24[15]} Constitutional Law No. 99-568 of 8 July 1999.

^{25[16]} On this subject, see, in particular, the article by CLERCKY Jocelyn, "Le Statut de la Cour pénale internationale et le droit constitutionnel français", Rev. Trim. Dr. h. (2000), p. 641-681; Benoît Tabaka, «Ratification du Statut de la Cour pénale internationale: révision constitutionnelle française et rapide tour du monde des problèmes posés», <http://jurisweb.citeweb.net/articles/17051999.htm>.

^{26[17]} Law of 8 August 2000 amending Article 118 of the constitution, A- No. 83, 25 August 2000, page 1965.

^{27[18]} Government Bill (extract) on the constitutional law amending the constitutional law of the Czech National Council No. 1/1993 Coll., Constitution of the Czech Republic, as amended by constitutional law no. 347/1997 Coll.



It has been suggested that, to avoid amending their constitutions, states could choose to interpret the relevant constitutional provisions in such a way as to avoid conflict with the statute. In that case those provisions should be construed as conferring immunity, by reason of a person's «*official capacity*», only in the national - and not the international - courts. This amounts to establishing two tiers of responsibility of office-holders, at the national and the international levels. Although superimposed, those responsibilities would be separate one from the other. In other words, where responsibility was subject to exceptions at national level, these would not necessarily apply at the international level.

A state could also maintain that a tacit exception from immunity was inherent in its constitution. In the case under consideration here, it might be conceived that, where the court required a state to surrender one of its leaders enjoying immunity, the state could justify handing that person over by interpreting the relevant constitutional provisions in the light of their intended purpose. Since the court's principal task is to combat impunity for perpetrators of «the most serious crimes of concern to the international community as a whole», a head of state or government who committed such a crime would probably violate the fundamental principles of his or her own constitution and could therefore be surrendered to the court, despite the protection normally guaranteed by the constitution.

Another possible interpretation in the same direction would be to maintain that lifting the immunity of heads of state or government has become a customary practice in public international law. In the House of Lords decision on General Pinochet's immunity, three of the five Law Lords confirmed this trend in international law. Lord Nicholls expressed the majority opinion in the following terms: «*International law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else. The contrary conclusion would make a mockery of international law.*» This decision led some scholars^{28[19]} to conclude that the fact that an individual is acting in an official capacity can never be an impediment to prosecution. They contend that for the past half-century it has been a well-established principle, repeatedly relied on by the courts, that the immunity from prosecution of incumbent or former heads of state or government cannot apply to crimes under international law. He makes specific reference to the *Versailles Treaty*^{29[20]}, *Charter of the Nuremberg Tribunal*^{30[21]}, the *Convention on the Prevention and Punishment of the Crime of Genocide*^{31[22]}, the work of the International Law Commission^{32[23]} and the Statutes of the International Criminal Tribunal for the Former Yugoslavia^{33[24]} and the International Criminal Tribunal for Rwanda^{34[25]}. A number of states with monistic tradition could moreover be said to give this principle tacit recognition, in that their

^{28[19]} DAVID E., cited in THEMIS, «L'affaire Pinochet ou le crépuscule des dictateurs ? », <http://www.ulb.ac.be/assoc/elsaulb/themi2.htm>.

^{29[20]} Article 227 of the *Versailles Treaty*.

^{30[21]} Article 7 of the *Charter of the International Military Tribunal, Nuremberg*.

^{31[22]} Article IV of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

^{32[23]} Principle III of the Principles of International Law recognised in the *Charter of the Nuremberg Tribunal* and in the Judgment of the Tribunal, 1950, International Law Commission; Article 2 of the *Draft Code of Offences against the Peace and Security of Mankind*, 1954, International Law Commission; Article 7 of the *Draft Code of Crimes against the Peace and Security of Mankind*, 1996, International Law Commission.

^{33[24]} Articles 1 and 6 of the statute, adopted on 25 May 1993 and amended on 13 May 1998. It should not be forgotten that the Prosecutor of this ad hoc tribunal indicted Slobodan Milosevic when he was still in power as head of state. <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>.

^{34[25]} Articles 1 and 5 of the statute of the tribunal. It should be noted that this tribunal has, inter alia, sentenced Jean Kambanda, the former Prime Minister of the interim government, to life imprisonment.



constitutions expressly state that the generally recognised principles of international law are part and parcel of their national law^{35[26]}.

This point of view can be substantiated by the example of Italy. Under Italian constitutional law immunity from prosecution in national public law is not enforceable against the court, since, as a result of Articles 10 and 11 of the constitution, the domestic legal system is automatically brought into line with Articles 27 and 98 of the Rome Statute. Article 10 in fact states «*Italy's legal system shall conform with the generally recognised principles of international law*» and Article 11 that Italy «*shall agree, on condition of reciprocity, to such limitations of sovereignty as may be necessary to a legal system ensuring peace and justice between nations*»^{36[27]}. Article 9 of the Austrian constitution has virtually the same effect^{37[28] 38[29]}.

In some constitutions, in particular in those of Central and Eastern Europe, provisions of international treaties in the field of Human Rights take precedence over conflicting provisions of the Constitution. This could facilitate the ratification of the Statute of Rome.

Finally, it should be noted that some States have a specific ratification procedure, permitting to ratify international treaties by qualified majority even though their content is deemed to be in conflict with other provisions of the constitution. Article 91 para 3 of the Constitution of the Netherlands allow to ratify a treaty, by two thirds majority of the members of both chambers, even though it seems that there could be conflicts between the treaty and the Constitution.

2. Surrender of Persons

Article 89 of the Rome Statute provides «*The Court may transmit a request for the arrest and surrender of a person ... to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person.*» This surrender procedure, which applies irrespective of the nationality of the person concerned, may be at variance with the ban on extraditing or expelling nationals to be found in many countries' constitutions^{39[30]}. To get around this problem and facilitate ratification, the statute's authors inserted Article 102, which differentiates between surrender and extradition. The article states that for the purpose of the statute: «a) '*Surrender*' means the delivering up of a person by a State to the Court, pursuant to this Statute; b) '*Extradition*' means the delivering up of a person by one State to another as provided by treaty, convention or national legislation». This differentiation between extradition and surrender has enabled a number of countries to ratify the statute without amending their constitutions, and will permit other countries to do so in the future. On ratifying

^{35[26]} See, in particular, Article 25 of the Constitution of Germany, Article 3 of the Constitution of Estonia, Articles 2 and 28 of the Constitution of Greece, Article 7 of the Constitution of Hungary, Article 135 of the Constitution of Lithuania, Article 3 of the Constitution of Andorra, Article 9 of the Constitution of Poland and Articles 8 and 16 of the Constitution of Portugal.

^{36[27]} Article 11 of the Italian constitution.

^{37[28]} This article of the constitution provides: «(1) *The generally recognised rules of international law shall be regarded as an integral part of federal law.* (2) *The Federation may, by legislation or a treaty requiring approval in accordance with Article 50 (1), transfer specific federal competencies to intergovernmental organisations or their organs and may make the activities of foreign states' organs inside Austria and Austrian organs abroad subject to the rules of public international law.*».

^{38[29]} On this subject see Constantin Economides, «The relationship between international and domestic law», in the Science and Technique of Democracy Collection, European Commission for Democracy through Law, Council of Europe, 1993.

^{39[30]} See, in particular, Article 19 of the Constitution of Germany, Articles 11(2f) and 14 of the Constitution of Cyprus; Article 9 of the Constitution of Croatia; Article 36 of the Constitution of Estonia; Article 13 of the Constitution of Georgia; Article 69 of the Constitution of Hungary; Article 13 of the Constitution of Lithuania; Article 4 of the Constitution of "the former Yugoslav Republic of Macedonia"; Article 23 of the constitution of Slovakia; Article 47 of the Constitution of Slovenia; Article 55 of the Constitution of Poland; Article 12 of the Constitution of the Czech Republic; Article 19 of the Constitution of Romania; Article 61 of the Russian Constitution and section 7 of the Finnish Constitution.



the statute, some states will choose to incorporate this distinction into their domestic law with higher legal value. However, some other states will have no other choice than to proceed with a constitutional amendment, as their domestic law does not admit this interpretation or because they wish to avoid any confusion on this subject in their national legal system.

Countries choosing to adopt the interpretation proposed in the statute, which may include Poland, Slovakia and Slovenia, will follow in the footsteps of Italy and Norway, which have already ratified it. On this issue, Italy took the view that there was no constitutional impediment^{40[31]}, since extradition existed only in inter-state relations and the concept did not apply to a state's relations with the court. Norway arrived at the same conclusion by holding that the transfer of nationals to the Court must be distinguished from extradition to another state, which is in fact prohibited by the constitution.

A number of other states^{41[32]} will probably proceed by amending their constitutions. Some, such as Germany and the Czech Republic, have already prepared bills of amendment. Germany proposes to add to Article 16 (2) of its Basic Law, which states «*No German may be extradited to a foreign country*», a provision to the effect that «*A regulation in derogation of this may be made by statute for extradition to a Member State of the European Union or to an international court*»^{42[33]}, and the Czech Republic intends to incorporate an Article 112c, providing: «*... c) the Czech Republic shall release for prosecution by the respective international criminal court its own citizen or a foreigner, ...*»^{43[34]} The advantage of this approach lies in the fact that it will undoubtedly eliminate all possibility of conflict with the rules of domestic law and ensure that the national courts comply with the obligations imposed by the statute, despite their reluctance to allow a national to be tried under another legal system. Its main drawback is - as already outlined above - that amending the constitution is a long and difficult process in some countries.

3. Sentencing

The third constitutional problem that can arise from the ratification of the Rome Statute concerns the sentences which may be imposed by the court. Under Article 77 of the statute, the penalties to which a person found guilty is liable include imprisonment for a term of thirty years and life imprisonment, where justified by the extreme gravity of the crime and the individual circumstances of the convicted person. This provision is at variance with a number of constitutions, which prohibit the imposition of a life sentence^{44[35]} or a prison term as long as thirty years.

As far as the underlying reason for this is that such penalties allow no chance of rehabilitation, it should be pointed out that the statute nonetheless makes provision for the possibility of rehabilitation, since Article 110 (3) requires the court to review the sentence to determine whether it should be reduced «*when the person has served two-thirds of the sentence, or 25 years in the case of life imprisonment.*»

^{40[31]} Article 26 of the Italian Constitution provides: «*Extradition of a citizen may be permitted only where it is expressly provided for in international conventions. In no instance shall extradition be granted for political offences*».

^{41[32]} This could be the case of Cyprus, Lithuania, Malta, Portugal, "the former Yugoslav Republic of Macedonia" and Turkey.

^{42[33]} Summary of the implications of ratification and implementation of the Rome Statute of the International Criminal Court by Germany, CONSULTATION ON IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Strasbourg, 16-17 May 2000, Consult/ICC (2000) 18.

^{43[34]} Government Bill (extract) on the constitutional law amending the constitutional law of the Czech National Council no. 1/1993 Coll., Constitution of the Czech Republic, as amended by constitutional law no. 347/1997 Coll..

^{44[35]} See, in particular, Article 30 of the Portuguese Constitution.



To the extent that the prohibition is based on the concept that these penalties expose the individual to a treatment prohibited in an absolute manner by the constitution, an amendment to the latter seems necessary. Such an amendment might simply consist in establishing an exception by providing that, where the court imposed a term of life imprisonment in accordance with the statute, this would not be anti-constitutional. Alternatively, it might provide that the country can surrender an accused person to the court despite the possibility that a life sentence may be pronounced^{45[36]}.

In any event, for the vast majority of states no constitutional problem arises with this provision. It is also important to note that, by virtue of Article 80 of the statute, states parties are not obliged to prescribe the same penalties for similar offences in their national law^{46[37]}.

The solution to another aspect of the same problem may lie in Article 103 of the Rome Statute, which defines the role of states in enforcing prison sentences. This article provides that sentences shall be served in a state designated by the court from a list of states which have indicated their willingness to accept sentenced persons. A state may make its acceptance subject to conditions, which must be agreed with the court and also be compatible with the provisions of Part 10 of the statute, which concerns enforcement. The state can also inform the court of any circumstances which could materially affect the terms or duration of imprisonment, and the court will then take a decision on this change under a well-defined procedure. States are therefore able to specify that they will not accept sentenced persons for periods longer than the maximum sentence permissible under national law. This is the approach followed by Spain, where the law ratifying the statute reads: «*Spain declares that, at the right moment, it will be prepared to receive persons condemned by the International Criminal Court, on the condition that the length of time of the imposed penalty does not exceed the highest maximum established for any crimes under Spanish legislation.*».

It should be noted that this article may also offer a solution to the problem of the prerogative of pardon, provided for in many countries' constitutions^{47[38]}. On this subject, the French Conseil Constitutionnel found «*whereas under Article 103 of the statute, a state which declares its willingness to accept persons sentenced by the International Criminal Court may attach conditions to its acceptance, which must be agreed by the court; whereas those conditions could 'materially affect the terms or extent of the imprisonment';*»^{48[39]} adding in the next paragraph «*... it follows from the above that, on declaring its willingness to accept sentenced persons, France could attach conditions to its acceptance, in particular concerning the application of national law on the enforcement of prison sentences; that it could also indicate that persons sentenced might be dispensed from serving all or part of a term of imprisonment as a result of exercise of the*

^{45[36]} On this subject, see, in particular, the Manual for the Ratification and Implementation of the Rome Statute, [http://209.217.98.79/pdf/lcc-guide-english%20\(PDF%20format\).pdf](http://209.217.98.79/pdf/lcc-guide-english%20(PDF%20format).pdf).

^{46[37]} The article provides «*Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part*».

^{47[38]} See Article 60 of the Constitution of Germany; Article 1 a) of the Constitution of Andorra; Article 65 of the Constitution of Austria; Articles 103, 111 and 125 of the Constitution of Belgium; Article 98 of the Constitution of Croatia; Article 24 of the Constitution of Denmark; Article 78 of the Constitution of Estonia; section 29 of the Constitution of Finland; Article 17 of the French Constitution; Article 73 of the Constitution of Georgia; Article 47 of the Constitution of Greece; Articles 29/E and 30/A of the Constitution of Hungary; Article 13 of the Constitution of Ireland; Article 87 of the Italian Constitution; Article 45 of the Constitution of Latvia; Article 84 of the Constitution of Lithuania; Article 83 of the Constitution of Luxembourg; Article 84 of the Constitution of "the former Yugoslav Republic of Macedonia"; Article 93 of the Constitution of Malta; Article 20 of the Norwegian Constitution; Article 139 of the Constitution of Poland; Article 62 of the Constitution of the Czech Republic; Article 94 of the Constitution of Romania; Article 102 of the Constitution of Slovakia; Article 107 of the Constitution of Slovenia; Article 87 of the Constitution of Turkey; and Article 106 of the Constitution of Ukraine.

^{48[39]} Conseil Constitutionnel, Paris, Decision No. 98-408 DC of 22 January 1999, page 472.



prerogative of pardon; consequently, the provisions of part 10 of the statute ... do not violate the essential conditions of the exercise of national sovereignty, nor Article 17 of the Constitution». Following this interpretation given to Article 103^{49[40]}, it would seem that states do not need to amend the provisions of their constitution concerning the prerogative of pardon. They are merely required to inform the court of their conditions, in particular the fact that the head of state or government may exercise the prerogative of pardon, or to follow the procedure for modifying the terms or duration of imprisonment laid down in the statute.

4. Other problems

Ratification of the statute may raise other constitutional issues. Apart from immunity, the decision by the French Conseil Constitutionnel addresses two other problems. Article 99 (4) of the statute provides « ... where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State» according to a well-defined procedure^{50[41]}.

The French Conseil Constitutionnel issued the following finding with regard to the above paragraph: «whereas under paragraph 4 of Article 99 of the statute, the Prosecutor may, even in circumstances where a national judicial authority is not unavailable, take certain investigatory measures outside the presence of the authorities of the requested State on the latter's territory; ... failing special circumstances, although the measures are in no way compulsory, the authority granted to the Prosecutor to take such measures without the presence of the competent French judicial authorities may violate the essential conditions of the exercise of national sovereignty ...»^{51[42]}. It therefore held that this provision breached the French constitution of 1958 and ratification necessitated a constitutional amendment.

The Luxembourg Conseil d'Etat reached a conclusion which is different from that of its French counterpart. It held that «paragraph 4 of Article 99 of the Rome Statute does not result in any conflict with provisions of our Fundamental Law. In so far as application of Article 99 of the Statute could lead to interference with the powers of the judicial authorities, in particular, Article 49bis^{52[43]} of the Constitution would allow a temporary transfer of powers»^{53[44]}.

The second problem identified by the French Conseil Constitutionnel lies in the fact that the International Criminal Court «could properly have jurisdiction to hear a case merely as a result of the application of an Amnesty Act or a national statute of limitations; in such circumstances, France, without being unwilling or unable, could be obliged to arrest a person and surrender him or her to the Court by reason of offences which, under French law, were covered by an amnesty or a limitation period; this would amount to a violation of the essential conditions of the exercise of national sovereignty»^{54[45]}. France adopted a new constitutional article which solves all the

^{49[40]} On this subject, see, in particular, F. Luchaire, «La Cour pénale internationale et la responsabilité du chef de l'Etat devant le Conseil Constitutionnel; *Revue du Droit Public* – No 2-1999, page 15.

^{50[41]} See Article 99 (4) of the statute.

^{51[42]} Page 472 of the decision by the Conseil Constitutionnel mentioned in footnote 39.

^{52[43]} This article provides «The exercise of powers which the Constitution reserves for the legislature, the executive or the judiciary may be temporarily transferred by treaty to institutions governed by international law».

^{53[44]} Opinion issued by the Conseil d'État on 4 May 1999, page 5.

^{54[45]} Page 471 of the decision by the Conseil Constitutionnel mentioned in footnote 39.



constitutional problems raised. It should be noted that most constitutions say nothing about whether crimes are subject to limitation. However, should a constitution need to be revised, the amendment could provide that limitation or an amnesty would not apply in the event of a request from the court to surrender an individual.

Article 39 (2)b)ii of the Statute may also cause constitutional problems. It provides that accused persons shall be heard by a Trial Chamber consisting of three judges, whereas some constitutions provide for a trial by jury^{55[46]}. It should be noted, however, that these constitutional provisions aim at regulating the procedure before the national criminal courts, and do not seem to require, as a general rule, a trial by jury in proceedings outside the national jurisdiction.

It has been claimed that Article 59 paras. 4 and 5 endanger the principle of habeas corpus as outlined specifically within Article 5 of the European Convention of Human Rights. Article 59 paras. 4 and 5 state that when the competent authority deals with a request for an interim release it "...[may not]...consider whether the warrant for arrest was properly issued in accordance with Article 58, para. 1 (a) and (b)", it cannot therefore examine whether there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and whether the arrest of the person appears necessary: to ensure the person's appearance at trial; or to ensure that the person does not obstruct or endanger the investigation of the court proceedings or, where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.^{56[47]} The Pre-Trial Chamber is informed of this request for interim release and shall "*make recommendations, to the competent authority in the custodial State*" which must, before rendering its decision, take such considerations clearly into account.

It must however be emphasised that the character of deprivation of liberty in question is not of the nature foreseen in Article 5 para. 1 (c) of the European Convention of Human Rights, which states that a person may be detained "for the purpose of bringing him before the competent judicial authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". It is rather a deprivation of liberty within the meaning of Article 5 para. 1 (f) which authorises a deprivation of liberty if it is "...the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation or extradition." In effect, the surrender of a person to an international organisation can be assimilated in this respect to an extradition^{57[48]}.

The scope of the obligation contained within Article 5 para. 4 is not identical for each type of deprivation of liberty; indeed this is particularly so as regards the scope of the judicial review required^{58[49]}. The Convention requires a review of the necessary conditions for the legality of a deprivation of liberty of an individual in relation to paragraph 1 of Article 5.^{59[50]} In respect of Article 5 para. 1 (f), the competent authority is not required to examine whether a "reasonable suspicion" exists to believe that the person arrested and detained has committed a crime, nor whether there is risk of fleeing, collusion or commission of other crimes. These elements are related to police custody and interim detention before criminal trial (envisaged in Article 5 para. 1 (c)). In the context of detention under Article 5 para. 1 (f), the judicial authority must investigate whether the detention was "lawful" with the frame of this provision; it must thus verify whether a

^{55[46]} See, in particular, Article 38 of the Irish Constitution; Article 150 of the Belgian Constitution and Article 97 of the Greek Constitution.

^{56[47]} Article 58 para. 1 (a) and (b) of the Statute of Rome.

^{57[48]} The preceding section of this report contains specific discussion on this point.

^{58[49]} See *Chahal v. United Kingdom*, No. 1 European Court of Human Rights, page 127.

^{59[50]} *Idem*.



procedure of extradition is effectively underway. The competent authority is not therefore asked to look into the elements referred in Article 58 paras. (a) and (b) of the Statute of Rome.

Another issue they may be raised is the question whether Articles 59 and 60 of the Statute are compatible with the constitutional principle that nobody can be deprived of the Court which his national law assigns as the competent court. It is true that, as a consequence of Articles 59 and 60, the accused after surrender to the Court can no longer request release on bail from the competent national judge in the country where he is detained but only from the Pre-Trial chamber. This does not seem to infringe upon the abovementioned principle, though, because after surrender the Pre-Trial Chamber becomes the "lawful court" competent to decide on the conditional release of the accused.

Conclusion

As we have just seen, ratification of the Rome Statute may raise a number of problems of constitutional law. Several constitutional problems can be identified in connection with the ratification of the Statute of Rome. They concern mainly the immunity of Heads of state or Government and persons with "*official status*", the extradition of nationals and sentences which may be pronounced by the Tribunal. In order to resolve these problems the European states could:

- inserting a provision into the constitution which would allow to settle all constitutional problems, thus avoiding the introduction of exceptions to each article concerned;
- introduce and/or apply a special procedure to ratify a treaty if any of its provisions are deemed to conflict with the Constitutions;
- systematically revising all constitutional provisions which are in conflict with the Statute;
- interpreting certain provisions of the constitution in a way to avoid conflict with the Statute of Rome

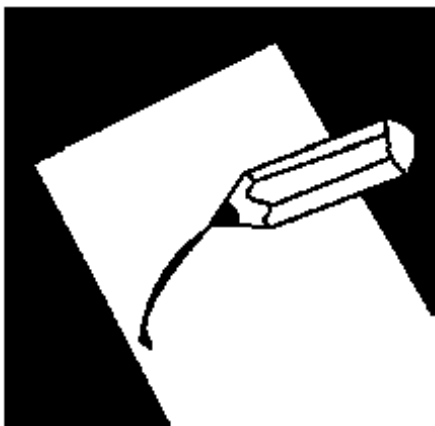
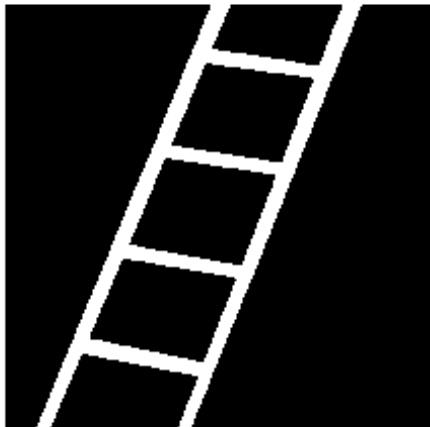
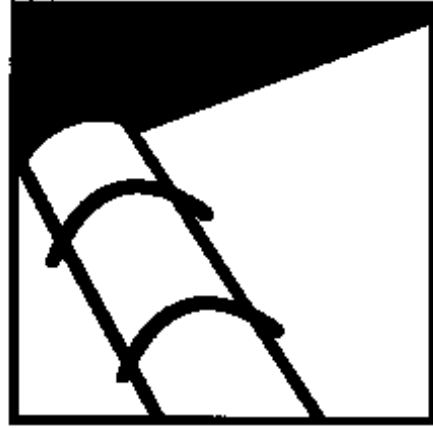
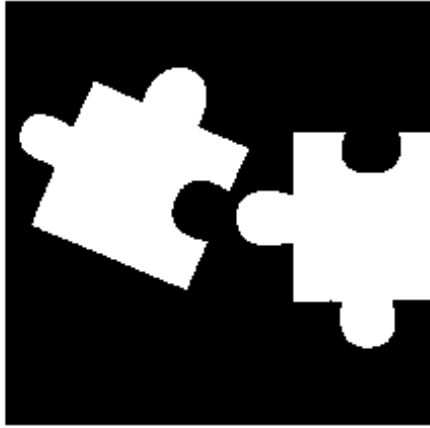
Ratification by members of Council of Europe will be necessary for the statute to enter into force.

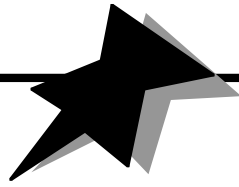
If member states comply with the recommendation^{60[51]} of the Parliamentary Assembly of the Council of Europe and the resolution^{61[52]} adopted by the European Parliament, ratifying the Rome Statute as quickly as possible, the international criminal court will become one of the architects of a solution putting an end to impunity to violation of humanitarian law and human rights.

^{60[51]} Referred to in footnote 3.

^{61[52]} Referred to in footnote 2.

SLIDES





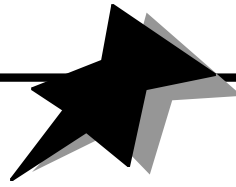
SLIDE 1

The Hague Regulations

- Regulate the use of force during hostilities
- Limit the means of combat (weapons)

Principle Conventions

- The Hague Conventions of 1899, 1907 and 1954
- The Chemical Weapons Convention of 1993
- The U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons of 1980



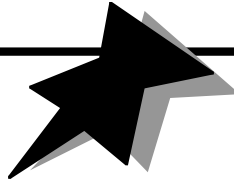
SLIDE 2

The Geneva Regulations

- Protect people
- Ensure that people be treated humanely

Principle Instruments: The Four Geneva Conventions of 1949

- I Convention: wounded and sick armed forces in the field
- II Convention: wounded, sick and shipwrecked armed forces at sea
- III Convention: prisoners of war
- IV Convention: civilians in times of war



SLIDE 3

Principles of International Humanitarian Law

- **Principle of Distinction:** Establishes differentiated treatment.
- **Principle of limitation of damage or proportionality:** Limits military operations during armed conflict, both in the means and the methods of war.
- **Principle of non-discrimination:** Prohibits discrimination for reasons of sex, language, politics, origin or nationality, religion, class, etc.
- **Principle of non-reciprocity:** A party to a conflict cannot exempt itself from complying with international humanitarian law under the pretext that the other side is not in compliance.

Protected people:

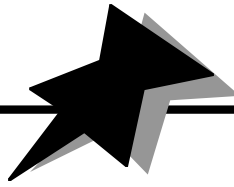
- Should not be attacked.
- Should not be subject to abusive or degrading treatment.
- Should be assisted if wounded or ill (both civilian and combatant).

Protected places and objects:

- Hospitals and ambulances should not be attacked.
- Certain emblems and symbols (e.g., the red cross) identify protected people and places which should not be attacked.
- Property indispensable to the survival of the civilian population should be protected.

Prohibited weapons:

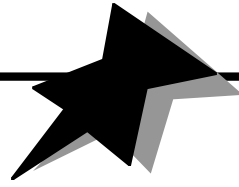
- Use of certain arms which cause superfluous or unnecessary damage is limited.
- Use of arms which cause grave and lasting damage to the environment is limited.



SLIDE 4

International Humanitarian Law

- The object of IHL is the protection of human beings.
- IHL is part of the basic reality of armed conflict.
- Combatants no longer in combat, and the civilian population are identified as separate groups.
- Protects non-combatant populations and the victims of international and domestic armed conflict.
- Establishes a set of guarantees for the civilian population and combatants no longer in combat, whether or not they have been deprived of liberty:
 - a) Inviolability (respect for life and physical and moral integrity).
 - b) Humane treatment without discrimination.
 - c) Security (prohibition of collective punishment; the principle of individual responsibility).
 - d) Guarantee of a fair trial for those deprived of liberty.

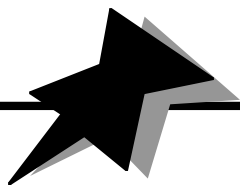


SLIDE 5

Additional Protocols to the Geneva Conventions

- Protocol I Additional to the Geneva Conventions (1977) protects:
 - The civilian population.
 - Property indispensable to the survival of the civilian population.
 - Cultural property and places of worship.
 - Works and installations containing dangerous forces (e.g., dams, dykes, nuclear power plants).
 - The environment.

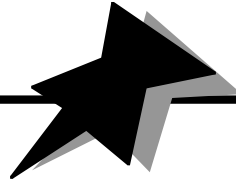
- Protocol II Additional to the Geneva Conventions (1977) further enumerates prohibited conduct, including:
 - (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
 - (b) Collective punishments;
 - (c) Taking of hostages;
 - (d) Acts of terrorism;
 - (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
 - (f) Slavery and the slave trade in all their forms (art. 4(2)).



SLIDE 6

Women and their Relationship to War

- a) Women combatants, whether they belong to the regular armed forces of a State in conflict or to rebel groups.
 - b) Women who have ceased combat (prisoners of war; wounded or shipwrecked).
 - c) Civilian women.
- There is no special regulation regarding women combatants. When international humanitarian law first took shape in its principle legal instruments, the protagonists of war and hostilities were exclusively male. Only later did women become increasingly involved in armed conflicts and combat, both domestic and international. This lack of regulations regarding women combatants leads to abusive situations.
 - Women who have ceased combat are the subject of special regulations in the Geneva Conventions and their Additional Protocols. Civilian women are also the subject of special regulations.



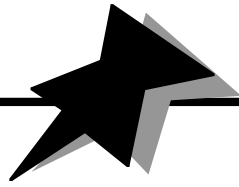
SLIDE 7

Definitions International Humanitarian Law

International Committee of the Red Cross (ICRC):

“International treaty or customary rules which are specially intended to resolve matters of humanitarian concern arising directly from armed conflicts, whether of an international or non-international nature; for humanitarian reasons those rules restrict the right of the parties to a conflict to use the method or means of warfare of their choice, and protect persons and property affected or liable to be affected by the conflict.”

“[International humanitarian law] comprises the rules which, in times of armed conflict, seek to protect persons who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed...The expressions international humanitarian law, the law of armed conflict and the law of war may be regarded as equivalents.”



SLIDE 8

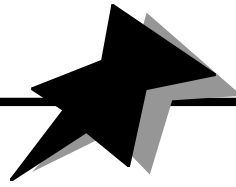
Human Rights

Definitions

--The rights and freedoms enjoyed in every place by every person, without distinction on the basis of race, color, sex, language, religion, political opinion, national or social origin, property, birth or other condition.

--A proposal for living in harmony: all members of the human family, women and men, are autonomous subjects deserving of dignity and rights.

--The legal norms that guarantee all human beings the conditions they need for their material and spiritual development, and the satisfaction of all their necessities.



SLIDE 9

Humanitarian Law

Humanitarian law has its roots in Antiquity. It evolved mainly during wars between European States, and became progressively consolidated from the Middle Ages. It was first developed during an historical period where recourse to force was not considered an illicit instrument of international politics. Humanitarian law is one of the oldest subjects of public international law. International humanitarian law is progressively penetrating States, to the point where it can be applied to internal armed conflicts.

Humanitarian Law

Geneva Conventions (1949)

In the preparatory work for the 1949 Geneva Conventions, references to human rights were few and far between. It was principally outside the operational provisions that they were mentioned, mostly in passing and in vague terms, or as a never superfluous profession of faith.

Only the (Fourth) Geneva Convention, relative to the Protection of Civilian Persons in Time of War comes close to human rights because it concerns the protection of individuals who do not have any military status **Human Rights**

Human Rights are the product of the theories of the Age of Enlightenment and found their natural expression in domestic constitutional law. It was only after the Second World War, as a reaction against the excesses of the Axis forces, that human rights law became part of the body of public international law. Although international human rights law began as a product of domestic law, it has tended progressively towards internationalization.

Human Rights

Universal Declaration (1948)

During the drafting of the Universal Declaration of 1948, the question of the impact of war on human rights was touched on only in exceptional cases. Paragraph 2 of the Preamble describes respect for human rights as a condition for the maintenance of peace.

The absence of any discussion of the problem of war can be explained by the general philosophy which prevailed within the United Nations at the time. There seemed to be a tacit but nevertheless general consensus that the Declaration was intended for times of peace, of which the United Nations was the guarantor... the Declaration was not a legislative text, and consequently, if it was to preserve its force and its own specific role, it had to be brief and concise and contain no ponderous and unnecessary elaboration.



SLIDE 10

Human Rights and Humanitarian Law

From the point of view of **legal instruments**:

Humanitarian Law

It has taken shape principally in the Hague Conventions, the Geneva Conventions and their Additional Protocols, and the Statute of the International Criminal Court. On a national level, humanitarian law is also influenced by human rights, since human rights must still be respected during times of conflict. National criminal codes, military criminal codes, and military justice are also applicable to conflict situations.

Human Rights

The Declaration of Human Rights is the principle source of human rights. Taking the Declaration as their point of departure, a series of conventions and covenants have been developed enumerating additional categories of rights. Examples include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (known as the “Belem do Para Convention”). On a national level, human rights take shape in charters or constitutions, as well as in national laws such as the criminal code and civil code.

From the point of view of **protected persons**:

Humanitarian Law

International humanitarian law protects combatants, combatants not in combat, and the civilian population.

Human Rights

Human rights protect all human beings, although in the course of their evolution, special emphasis has been placed on groups subject to discriminations: women, children, minorities, etc.

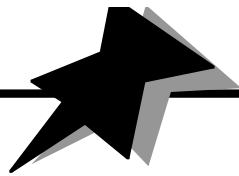
From the point of view of **those responsible for their application**:

Humanitarian Law

States, armed groups and the parties to a conflict are responsible for applying humanitarian law.

Human Rights

The responsibility for applying human rights lies primarily with States and their institutions, although increasingly, each individual human being also shares in this responsibility.



SLIDE 11

Human Rights and Humanitarian Law

From the point of view of **when** they are applied:

Humanitarian Law

- Humanitarian law is only applicable to armed conflicts, whether domestic or international.
- Regulates relations between the armed forces of the parties in conflict, and the between parties in conflict and civilians. The Fourth Convention does not apply to the relations of a State with its own nationals. Its sole objectives are to govern relations between a belligerent and enemy civilians who, as a result of the occupation of the territory of the State of which they are nationals, are under the control of the adverse power.
- The scope of the Conventions remains dependent on the objective concept of the protected person, defined according to his or her status in relation to the events of war (sick, wounded, prisoner of war, civilian). Very little room for the idea of attributing supreme subjective rights, without any distinction, deriving solely from the quality of being human.
- Humanitarian law cannot be suspended; it remains in force as long as the conflict continues and afterwards, without exception.

Human Rights

- Human rights are concerned with the organization of State power vis-à-vis the individual, principally in times of peace. However, since human rights apply to all humans, they are also applicable in times of war.
- The condition of being human entitles a person to human rights, irregardless of any political, economic, or social condition. No special situations are needed in order to be entitled to human rights.

Certain human rights can be limited in times of war or other national security emergencies. This derogability does not include the so-called “hard core” rights: the right to life, the prohibition of torture and other inhumane treatment, and the prohibition of slavery.



SLIDE 12

Human Rights and Humanitarian Law

From the point of view of **protection mechanisms**:

Humanitarian Law

The need for international courts has long been recognized in the realm of humanitarian law, and has been made reality in the Nuremburg and Tokyo Tribunals, the Tribunals for Rwanda and the former Yugoslavia, and soon, the International Criminal Court.

- On the national level, military tribunals have an important role during times of war, although ordinary courts still continue to function.

Human Rights

There are several mechanisms for protection of human rights on the universal and regional level, including: the Inter-American Court of Human Rights; the International Court of Justice in the Hague; and the European Court of Human Rights.

- On the national level, ordinary courts ought to be sufficient to resolve human rights violations.

From the point of view of **formulation**:

Humanitarian Law

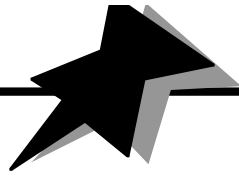
Humanitarian law is formulated principally as a series of obligations for combatants. The rights of combatants, of combatants not in combat, and of the civilian population are also enumerated.

Humanitarian law treaties are universal, without regional distinctions, although humanitarian accords can be reached between the parties in conflict.

Human Rights

As expressed in human rights treaties, the language of human rights law tends to be based on the enunciation of rights accompanied accordingly by State obligations.

Regional and universal human rights treaties exist simultaneously.

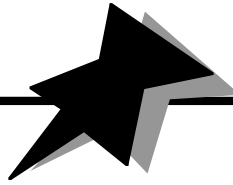


SLIDE 14

Similarities: Human Rights and Humanitarian Law

- War no longer constitutes a legitimate means to settle a conflict, but rather a means to protect non-combatants from the atrocities of war.
- Humanitarian law is an effective protection mechanism for vulnerable persons during armed conflict only if applied by all parties in conflict.
- The convergence between both branches can be seen in the activities of the bodies which regulate and apply international law. In the past few years, the United Nations Security Council has invoked international humanitarian law with increasing frequency in order to support its resolutions.
- International humanitarian law and international human rights law have a relationship of complementarity, in that during conflict, IHL enforces the “hard core” of non-derogable human rights.
- The widening definition of international crimes has led to a convergence of the two branches of law in respect to crimes against humanity, which can be prosecuted in times of war and in times of peace. In addition, certain crimes, such as genocide, are found in both branches.
- International human rights law has adopted certain elements of international humanitarian law. Today, the systematic violation of human rights is punishable, at least in theory, though the path towards the trial and punishment of human rights violators still lies ahead.
- Both branches of law should be promoted as preventative measures.
- Both branches of law, given their international character, become part of domestic law of States once their instruments have been signed and ratified. States then become responsible for the application of the law.
- Both branches of law have as their ultimate end the protection of human dignity and the fight against impunity.

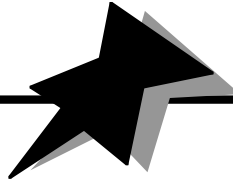
International humanitarian law and international human rights law converge in respect to their fundamental guarantees, independent of the existence of a conflict. They both guarantee a minimum of protection of the “hard core” rights common to both branches.



SLIDE 15

International Criminal Law

“International criminal law is the branch of international law which imposes criminal responsibility and/or punishes individuals, States or other entities for criminal violations.”



SLIDE 16

International Crimes

Genocide: Defined in the 1948 Genocide Convention.

Crimes against humanity: Legal origins in the Second World War; included in the various international human rights instruments.

Aggression: Originated in the Tokyo and Nuremburg charters. Part of international custom.

Violations of the laws, customs and uses applicable to armed conflict: Defined in the Hague Conventions and the Geneva Conventions and their protocols.

Other crimes contained in international treaties: Specific conduct sanctioned by conventions or treaties, such as crimes committed against United Nations personnel, torture, or slavery.



SLIDE 17

Legal Foundations of International Crimes

- International conventions that consider the conduct to be criminal.
- International customary law that considers the conduct to be criminal.
- General principles of international law that consider the conduct to be a crime against international law, or a crime included in a convention in the process of being formulated.
- International conventions that prohibit a conduct do not sanction it as a crime.



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International Crimes

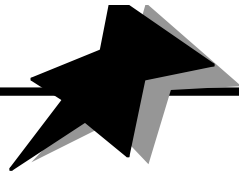
GENOCIDE

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

CRIMES AGAINST HUMANITY

- Must be committed against the civilian population.
- Must be committed on a massive or systematic scale.
- Must be committed with intentionality.

Crimes against humanity include: murder, extermination, slavery, deportaion, torture, imprisonment in violation of international law, rape, persecution for political, racial, or religious motives, and other inhumane acts.



SLIDE 19

International Crimes

a. Crimes against law and custom applicable to armed conflict

These are known as “war crimes”. They correspond to the Hague Regulations and their rules governing war and its limitations, as well as to the Geneva Regulations and its rules governing protection of the victims of war.

b. Breaches of the Hague Conventions and other regulations of war

Codified in numerous conventions and protocols which originate in the 14 conventions drafted between 1899 and 1907. On the basis of these conventions, legislation on the limitation and regulation of war has continued. Applicable to international conflicts. The crimes defined mainly concern the type of arms to be used in conflict.

c. Breaches of the Geneva Conventions

The Geneva conventions distinguish between grave infractions and other infractions. Grave infractions include:

Willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; unlawful deportation or transfer or unlawful confinement of a protected person; compelling a protected person to serve in the forces of a hostile Power; willfully depriving a protected person of the rights of fair and regular trial; taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (art. 147, Convention (IV) relative to the Protection of Civilian Persons in Time of War).

These types of grave breaches are considered part of international customary law. They are therefore binding on all States, in that they must prosecute or extradite alleged perpetrators of grave breaches. Although the grave breaches listed above are crimes committed during an international armed conflict, it should be emphasized that Article 3 common to the Geneva Conventions also gives minimum standards for internal armed conflict. However, these standards, elaborated in Protocol II Additional to the Geneva Conventions, have an uncertain international status, since not all states have accepted them as part of international customary law.

d. Crimes and offenses based on other treaties

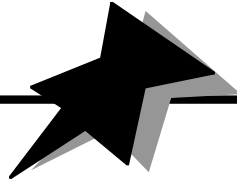
Acts included in specific treaties dealing with matters of exceptional preoccupation to the international community, including, among others: apartheid, terrorism, drug trafficking, the security of UN personnel. There was no consensus on including these crimes in the Statute of the International Criminal Courts. Many could be included under other categories already present in the Statute, and including the remainder would risk diluting the Statute.



SLIDE 20

Internally Displaced Persons

“Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”



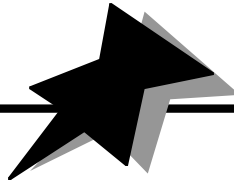
SLIDE 21

Why is an International Criminal Court necessary?

Since the establishment of the Nuremburg Tribunal fifty years ago, perpetrators of atrocities—the killing fields of Cambodia, the poisonous gas attacks against the Kurds, the detentions and disappearances in Childe, the comfort women in Asia—have evaded justice. Increasingly, international opinion is arriving at the consensus that we must put an end to impunity. The ultimate expression of this desire is the creation of the International Criminal Court.

In the future, the International Criminal Court will be able to try individuals who have committed the gravest crimes: genocide, crimes against humanity, and war crimes. The ICC will be a promise of justice, deterrence, reparation, and reconciliation.

We have only just left behind the bloodiest century in the history of humanity, marked by tragedies such as the ethnic cleaning in Bosnia and the genocide in Rwanda. The International Criminal Court is of immense importance to humanity.



SLIDE 22

Admissibility to the International Criminal Court

Acceding to the International Criminal Court

Step One: ICC Ratification

- The Statute of the ICC must be ratified by 60 States.
- The ICC will have jurisdiction over crimes committed only after the Statute's entry into force.

Step Two: Preconditions for admissability to the ICC

- Before the ICC can activate its jurisdiction, its jurisdiction must be accepted by:

The State where the crime took place

The State of which the accused is a citizen

- “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5 (art. 21).”

